MISSISSIPPI LAW JOURNAL

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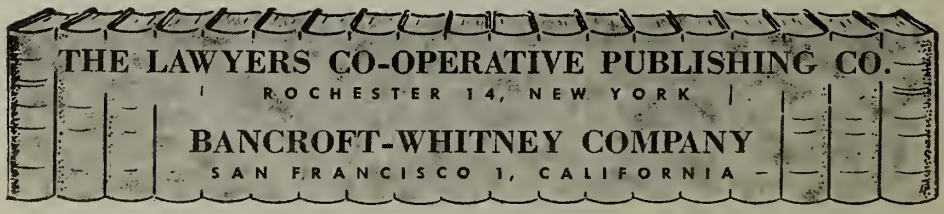

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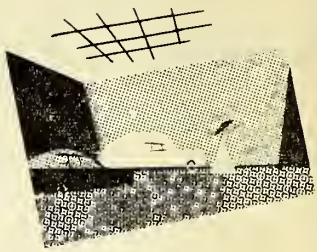

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Mississippi Law Journal

VOLUME XXVII MARCH, 1956 NUMBER 2

TRUTH, THE ESSENTIAL ELEMENT OF JUSTICE†

*George W. Hardy, Jr.**

It is of justice that I would speak. Of necessity the discussion must be limited to some phase or quality, for without such circumscription the scope of the discussion would extend far beyond the time at our disposal.

Just what do we mean by justice? Is its administration and effect dependent upon time, place, race, creed or condition? Is justice indeed the prized possession of all Americans, or is it reserved for those able to retain the services of astute legal counsel? Is justice a thing of such local interest and regard that we need have no concern for the reflection of our own kind and type of justice in the far-off places of the world? These questions might be multiplied many times over and we would still fail to exhaust the almost infinite ramifications of the subject. But some of these demand an answer in order that we may be properly impressed with our responsibilities pertaining to a true concept of justice.

The definition of the quality has occupied the minds of the great philosophers as well as the average citizens of the world. Recourse to the dictionary apprises us that justice is defined as the principle of rectitude and just dealing of men with each other. The concept of ideal justice as fashioned by Plato required his imaginary construction of an Utopian society in order that he might lead to his conclusion that such an ideal could be obtained only through perfect social harmony. Aristotle considered justice to be the practice of virtue in man's relationship with his fellows.

Implicit in these and all other definitions is the conclusion that *truth* constitutes an essential element of justice. Obviously it follows that there can be no justice in absence of truth. Yet how many times, day after day, indeed almost hour after hour, do we pass judgment upon our fellows without knowledge of any truth upon which to predicate that judgment? Is this justice?

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†From an address given at the Tenth Annual Mississippi Law Institute, Jackson, Mississippi, December 2, 1955.

*Presiding Judge, Second Circuit Court of Appeal, State of Louisiana.

It is to be seen that justice, as a word or as an ideal, is susceptible of many definitions, none of which prove to be entirely satisfactory. However, as a general proposition we may say there are two aspects of justice, one of which is epitomized in the coldly formal, impersonal pronouncements of judges in accordance with laws and statutes. The other is comprehended by a more informal, indeed a somewhat casual, pronouncement that takes the form and likeness of public opinion. We are somewhat demanding in our attitude toward courts, judges, and lawyers in whom we repose the custody and administration of formal justice. We not only expect, but we require, at the hands of these guardians of one of our most sacred possessions an absolute, uncompromising, and incorruptible integrity. These agents and agencies of justice must be above and beyond the persuasion of passion, the effect of emotion. It is with absolute right that the public makes these demands and insists upon conformity to these high standards.

But there is another tribunal before the bar of which, day after day, appear hundreds, even thousands of individuals, many times the number of those who are formally charged and prosecuted in our courts, and this we call the court of public opinion. The penalties which result from conviction and sentence in this forum, in many instances, are no less severe than those imposed by judicial authority in response to the requirements of written statutes. An individual's business may be impaired or destroyed and thereby he suffers a deprivation of the right of property; a reputation may be impaired or destroyed and thereby its erstwhile possessor is deprived of his right to the decent and respectful regard of society, and loses a possession far more valuable than that which is evidenced by the ownership of tangible property; in some instances an individual's freedom is so circumscribed and limited that for all practical purposes he loses that inalienable right of liberty which is constitutionally guaranteed.

In view of the severity of these penalties and their resultant effects, let us examine briefly the formalities, or the lack thereof, if you will, by which conviction and sentence are brought about.

The charge, the information, the indictment, is susceptible of presentation by any one of a number of methods: a newspaper story, the casual observation of a radio commentator, the mere statement made by a figure of public importance or position, a whisper circulated and magnified.

The proffering of the charge is followed almost immediately by the development of the trial. Observe that the accused is deprived of the process of arraignment, and the opportunity to plead to the charge, for,

ordinarily, he has no forum of which to avail himself, possesses no alternative save to await the presentation by the prosecution. The trial proceeds through the media of communication: word of mouth, telephone, telegraph, radio, newspapers, periodicals, propaganda publications, television—all of the evidences of the tremendous progress of man in this field, progress which has brought consequent blessing to mankind, but which, misused, can as well prove to be a curse.

Finally, the jury considers its verdict. The jury is made up of all of us, and, obviously, we are not segregated for the purpose of debating our conclusions. We consider and discuss the evidence on street corners, in coffee shops, bars, country clubs, the living rooms of our homes, in all of the innumerable places where men and women gather in varying numbers. Finally we, the people, as the jury, read our verdict, a verdict which is not reduced to writing, which has no formal expression, but one which is nevertheless made evident in inescapable fashion. The sentence which automatically follows is not enforced by court bailiffs, nor peace officers, but, again, by us, the people, who have acted as judge, jury and jailer.

It is not my purpose nor do I wish to be understood as being adversely critical of public opinion, which, in the final analysis, is one of the fundamental forces that determines the progress of mankind. But I am critical, intentionally so, of what appears to me to be a growing tendency on the part of the people to form and express their opinions upon the basis of insufficient evidence and without knowledge of all the facts. I think it is a universal experience of judges that the determination of cases presented to them would be free from difficulty if they were required to hear the argument and read the brief of only one party to the litigation. There are times when all of us feel a considerable sympathy for the old justice of the peace who observed that he only listened to the plaintiff, because if he listened to both sides he became confused.

In my opinion the importance of factual information on the part of the public cannot be over-emphasized and I am firmly convinced that, as members of that great body charged with the responsibility of expressing public opinion, it is incumbent upon each of us to demand *all* the evidence available, to require the presentation of *all* material facts and to reserve judgment pending their consideration and evaluation. It has been somewhat cynically observed that the American people today are better informed and less intelligent than at any time in our history. If this be true, even in the slightest degree, the fault is ours.

The very facility and availability of the many media of communication which we today enjoy present a serious problem. Recently the nation was shocked by the tragedy of a plane explosion which brought

death to forty-four people. Within a matter of hours after the apprehension of the person accused of causing the disaster a radio commentator on a national network bemoaned the fact that it was not permissible under law to subject this person to death by slow and lingering torture, and decried the fact that the sentence of death would be mercifully executed. A few days later in his Sunday evening program another nationally known radio commentator suggested that the man accused of the heinous crime of mass murder be used as a victim in an experimental demonstration of atomic destruction. I enjoin you to note that these comments were made before the accused was indicted, to say nothing of being arraigned and tried. This is a pattern of thought reminiscent of the tortures and inquisitions of the Middle Ages, the burning of witches guilty of no crime unless it be considered a crime to be feared by timid hearts and faithless souls.

It matters not whether the public opinion which in precipitous haste tries, convicts, and sentences an accused is represented in a small community, a county, a state, or a nation. The action which you and I take in our separate communities, to whatever extent it affects the spirit of justice, is a matter of interest and concern to the entire world.

About two years ago in a central Louisiana parish a young man shot and killed a deputy sheriff who was the brother of the sheriff of the parish. Within the space of nineteen days the accused was indicted, arraigned, tried, convicted, and sentenced to death. The young man was represented by court appointed counsel embracing all the members of the bar of the parish in which the crime was committed. Not a single exception to the conduct of the trial was taken by counsel for the accused, despite the fact that numerous irregularities marked the course of the trial. The case aroused a considerable amount of public interest, and the unseemly haste with which the proceedings had been conducted raised a question as to whether the accused had been accorded the benefit of due process of law—whether, in truth, he had received justice. The Louisiana State Bar Association intervened and appointed a committee to make an investigation. The report and the conclusions reached by unanimous action of the members of the committee clearly evidenced its belief that a gross injustice had been done, under the very cloak and sanction of a legal proceeding in accordance with the forms and before a court of law. The Association provided counsel who unsuccessfully appealed the case to the Supreme Court of Louisiana and finally the Supreme Court of the United States. In rejecting the appeal on procedural grounds, the United States Supreme Court clearly indicated in its opinion the advisability of a habeas corpus proceeding, which accordingly was instituted before the Federal District Court for the Western

District of Louisiana. The Federal District Judge, in a lengthy and well-reasoned opinion, condemned the proceedings as a violation of the right of due process of law and granted the writ.

It is significant that in all of the proceedings in the attempt to protect the legal rights of the convicted slayer, the matter of guilt or innocence was accorded no consideration, for this issue was not material. Our concept of justice extends beyond the question of guilt or innocence and involves the right to a fair and impartial trial under due process of law. The idea has been well expressed by a contemporary writer in these words:

> "You weaken the aura of all good laws every time you break a bad one—or every time you take a short cut around the 'due process' of a good one. The lynching of the guilty is a subtler but no less deadly blow to civilization than the lynching of the innocent."

A recent case in Mississippi has attracted worldwide attention, and this universal interest, transcending state and national boundaries, makes the matter appropriate to this discussion.

Some weeks ago I received a letter from a very brilliant young man only recently graduated in law from Exeter College of Oxford University. This youth was a classmate of my son in Oxford and I had the pleasure of meeting him on a visit to England this past summer. To his personal letter, written in the early part of October, the young man had subscribed the following postscript:

> "I must admit the recent case in Sumner, Mississippi, baffled me to some extent, perhaps as much as the recent Soho case of which you have no doubt heard, baffled you. One of these days I intend to write a thesis on the empirical application of justice—or am I being rather too cynical?"

It seemed to me important to answer and I wrote, in part, as follows:

> "As you no doubt fully realized when you appended the postscript, your reference to the recent Mississippi case has attracted my deep interest. At your leisure I would very much appreciate hearing your narrative of the facts and the source thereof which had the effect of "baffling" you. The reason for this request quite obviously lies in my fear that you did not have sufficiently adequate and reliable facts upon which to base any sort of conclusion. I would not like to have your thesis on the empirical application of justice subjected to criticism on this account, that

is, if you contemplate using the particular case by way of illustration.

"In answer to your question 'Am I being rather too cynical,' I would prefer to say that the fault would lie not in the degree but in the fact itself, for cynicism is an ugly garment which is sometimes used to cloak our own fears, doubts and insufficiencies, and may I add, since I have fallen into such a philosophical trend, that such a garment is particularly unbecoming to youth, which should never admit the existence of any such disturbing considerations as fears, doubts, or insufficiencies. You see, Dick, absolute justice, like absolute happiness, never depends upon achievement but rather upon pursuit by those who are willing to fight, to live and die for an ideal.

"Specifically with reference to the Mississippi case, it is most unfortunate that it should have become a cause celebre at a time when the tensions of opposed prejudices have become strained to the breaking point. As I understand and appreciate the facts developed, there can be no question as to the propriety of the verdict, for the state completely failed to prove its case for the prosecution. Rather than decry a possible miscarriage of justice, we Americans should again return thanks for our inheritance from our Anglo-Saxon background of the principle that a man is presumed to be innocent until proven guilty. Undeniably the enforcement of this principle may in rare instances prevent the just punishment of one who is guilty, but, in our balancing of values, should ever we depart from the theory that it is better a thousand guilty escape than one innocent be punished, then, indeed, will our civilization be in jeopardy."

These two illustrations serve to emphasize the point I strive to make, that truth is the most important essential of justice. In one case truth was not adduced. In the other truth was not circulated.

I am indebted to the junior Senator from Wisconsin—parenthetically let me observe that I fondly hope and devoutly pray this is my only obligation to him—for a recent pronouncement in which he is reported to have said that he was in possession of *"certain facts which if true"* would result in some startling disclosures. This vividly illustrates my contention. How can a thing be a fact if it does not exist, and how can it exist if it is not true? We are guilty of the same error in our blind and unreasoning acceptance of alleged facts, of unsupported statements, of pronouncements of opinions as truth. It is a matter for concern that upon the basis of these unconfirmed and unproved affirmations, we, the

people, casually try and condemn our fellows with much haste and little thought.

Many of the difficulties which the world faces today result directly or indirectly from prejudice, that divisive force with and by which every world conqueror seeks to achieve his purpose. Prejudice, literally, is the result of prejudgment, that is, of judgment pronounced without knowledge of the facts involved, judgment rendered before the truth is known. Through the centuries lawyers have assumed the primary responsibility for safeguarding justice, as witness the myriad declarations, constitutions, statutes and laws conceived and adopted through the influence of those who are dedicated to the pursuit of law. It logically follows, by reason of their very profession, that lawyers must then be charged with the leadership in thought and in action which seeks to develop and maintain the element of truth in all connotations of justice, not only before the bars of courts, but before the bar of public opinion, before which they must appear as advocates of one and only one client, truth.

I would not be understood as asserting the conclusion that truth, as an essential element of justice, should be considered only in the passive sense, for this would be error. The truth which is a part of justice is not static but is vital with energy and purpose. Accepting this concept there devolves upon us not the simple and easy responsibility for mere insistence upon truth, but the more demanding obligation to search out the truth and to make of it a pure and vital force in the administration of justice.

Perhaps of all definitions, of all concepts, the simple statement of Disraeli is most impressive:

"Justice is truth in action."

DAMAGES FOR PERSONAL INJURY AND WRONGFUL DEATH

*Quitman Ross**

How much is too much? How little is not enough? What is an excessive verdict? What is an inadequate verdict? If these questions strike the reader as ridiculous, then the answer is that they are no more so than would be an attempted determination of the excessiveness or inadequacy of an award without initial inquiry into the many elements of damages for which the award is intended as compensation.

Introduction

Originally there could be no recovery for injuries to the person regardless of how inflicted, and it was not until 1846 when the English Parliament passed Lord Campbell's Act[1] that recovery could be had for wrongful death. In 1851 Congress passed a law by which the owners of ships in all the common cases of maritime loss could surrender the vessel and her freight then pending to the losers, and thereupon further proceedings against the owners would cease. Until far into the last century, it was a rule of criminal pleading in England that an indictment for homicide set forth the value of the instrument causing the death in order that the King or his grantee might claim forfeiture of the deodand "as an accursed thing."[2]

There is this well-known passage in Exodus XXI: 28: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned and his flesh shall not be eaten; but the owner of the ox shall be quit." The Greeks, learning from the Jews, developed the quoted passage into a system. Plutarch relates that a dog that had bitten a man was to be delivered up bound to a log four cubits long. Elaborate provisions were made in the laws for many such cases. If a slave killed a man, he was to be given up to the relatives of the deceased. If he wounded a man, he was to be given up to the injured party to be used as he pleased. There were many other like provisions in the Greek laws. The Romans embodied in their Twelve Tables many similar principles, among them the rule that if an animal had done damage, either the animal was to be surrendered or the damage paid.[3]

A peculiarity of these early and even much later forms of liability is that the liability was regarded as attached to the body doing the damage, in a physical sense. Justice Holmes, writing in 1881, observed

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*Attorney at Law, Laurel, Mississippi.

[1]9 & 10 VICT., c. 93.

[2]HOLMES, THE COMMON LAW 6, 7 (1881).

[3]*Id.* at 7, 8.

that even a civilized man will kick a door when it pinches his finger.[4] Now, three-quarters of a century later, that same civilized man may not only kick the offending door, but the kicking is apt to be accompanied by a profusion of senseless epithets.

As the common law developed, we gradually got away from the idea of vengeance as well as that of proceeding against or sacrificing the thing causing the injury, the deodand. It is not meant here to suggest that we abolished one theory and adopted another, for the law did not start with a theory, and it has never developed one. Again, Justice Holmes has given us the apt phrase when he said that "The life of the law has not been logic: it has been experience."[5]

Damages for Injuries to the Person

It is said that well over half the cases occupying the attention of trial courts in the United States are actions for personal injuries or wrongful death. Since the automobile came into general use less than half a century ago it has been directly responsible for more deaths than all the wars in which the United States has been engaged since the Revolution. Death and injury upon the highways have become so commonplace and so standardized that it is now possible for organizations engaged in that business to fairly accurately predict in advance of any holiday or long week end the number of persons who will die in automobile collisions and accidents during that period. Most persons who die or are maimed in this way are persons who toil for daily bread or are the dependents of such persons. Indeed the twin enemies of thrift, unbridled inflation and taxes, have made us all day-to-day livers.

Formerly, most personal injuries fell into that category now known as industrial accidents, but the common law put many pitfalls into the pathway of servants seeking to recover from their masters. The doctrines of contributory negligence and assumption of risk and the fellow servant rule are notable examples. Mississippi led the way in modifying the harshness of some of these common law rules and defenses;[6] as early as 1910 we got rid of the defense of contributory negligence as an absolute bar to recovery by the passage of our comparative negligence statute,[7] which might well serve as a model for all other states, it being the only genuine comparative negligence statute in the United States. The doctrine of assumption of risk, noting an exception for railway conductors and locomotive engineers who have their own separate remedy,[8] was abolished in 1914.

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[4] *Id.* at 4.
[5] *Id.* at 1.
[6] MISS. CONST. art. VII, § 193.
[7] MISS. CODE ANN. § 1454 (1942).
[8] 35 STAT. 66 (1908), 45 U.S.C. § 54 (1952).

Having thus gone further than any other state in ameliorating the harshness of the common law in this particular regard, the legislature of 1948 at one fell swoop did away with all of its previous good work by completely abolishing all legal remedies of servants against their masters for personal injuries sustained in the course of employment.

The plaintiff of the present day, like his counterpart of the past, travels an uneven pathway. He is sometimes depicted as occupying a bed of roses, but a more accurate picture would show him wearing a crown of thorns and attended by an ulcer-ridden advocate headed for an early grave. Getting and keeping verdicts in personal injury cases is a difficult task at best; and through the years there has been little certainty of what might be expected, and perhaps less uniformity in what the courts have said and done than in any other branch of the law.

In the last half century, we have progressed from kerosene lamps to neon lights, from rutted dirt roads to vast stretches of paved highways costing tens of millions of dollars, over which we drive at astonishing rates of speed in sleek automobiles ranging in price upward from three thousand dollars. We work in air-conditioned offices, live in homes of thermostatically regulated uniform heat, and travel to Europe in less time than not so long ago was required to pass from Oxford to Memphis; and yet there are those among us who cite, rely upon, and insist upon adhering to verdicts and awards considered adequate at the turn of the century.

In 1896 an Indiana court held a verdict of $1,100 adequate for the loss of a right leg to a seven-year-old girl.[9] In 1911 the Arkansas Supreme Court ordered a remittitur of $5,000 from a $10,000 verdict for the loss of both legs.[10] In 1892 a thirty-year-old stevedore suffered a comminuted fracture of his leg which necessitated amputation below the knee,[11] and the trial judge allowed him $500 for his suffering and $1,786 for his loss of earning capacity, commenting, "His disability is for life, but for life only."

In that same era we in Mississippi were doing about as well as we are now. In 1906, J. W. Wallace, a brakeman employed by the Yazoo & Mississippi Valley Railroad Company, while in the course of his employment was thrown from the engine of one of his master's trains beneath the wheels thereof, resulting in the loss of both legs. On the first trial of the case he was awarded a verdict of $50,000 but on appeal the case was reversed for errors in pleading and for other causes.[12] On remand, the

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[9]Berry v. Lake Erie & W.R.R., 72 Fed. 488 (D. Ind. 1896).
[10]St. Louis, I.M. & S. Ry. v. Hesterly, 98 Ark. 240, 135 S.W. 874 (1911).
[11]Hamilton v. The William Branfoot, 48 Fed. 914 (D.S.C. 1892).
[12]Yazoo & M.V.R.R. v. Wallace, 90 Miss. 609, 43 So. 469 (1907).

case was retried on an amended declaration and the jury again returned a verdict for $50,000. The same judge presided in both trials, but of necessity different jurors served, and at that time a unanimous verdict was required. So the judge twice passed upon the amount of the verdict, and a total of twenty-four citizens of Yazoo County of presumably fair judgment were unanimous in determining that Wallace had been damaged by the loss of his legs in the full sum of $50,000. On the second appeal of the case[13] the court found no other error, but held the verdict so excessive as to indicate bias and prejudice on the part of the jury and ordered a remittitur of $20,000, leaving Wallace with a net recovery of $30,000. At the time of his injury, Wallace had a life expectancy of thirty-eight years, and thus was permitted to keep $789.47 a year as total compensation for complete disability, pain and suffering, humiliation, the cost of artificial limbs, and doctor and hospital bills which had already amounted to $1,600. As inadequate as this may seem, Wallace came out far better than do many present-day plaintiffs who recover considerably more for comparable injuries.

It is thought that the verdict in the *Wallace* case was the most adequate ever returned in Mississippi up to that date. By rigid economy, indeed frugality, Wallace could conceivably have lived and supplied himself with the necessities of life for $789.47 a year with economic conditions as they existed in 1908 when the award was finally paid.

The most adequate award in a personal injury case ever returned by a jury in the United States was in *Maynard v. Chicago, M., St. P. & Pac. R.R.*, decided in 1954 by a federal court in Illinois. Maynard, a forty-three-year-old painter earning $110 a week, suffered the loss of both legs just below the hip joint, his left arm just below the elbow, and four fingers of his right hand. Additionally, there was sufficient soft tissue damage to the right hand to render it virtually useless. District Judge Igoe, before whom the case was tried, reduced the award from $420,000 to $252,000, and it was subsequently settled for an undisclosed amount.

On the assumption that Maynard actually collected $252,000, which he did not, he still got little, if any, more than did Wallace. Maynard was much more severely injured than was Wallace and his damages manyfold greater, for Maynard was earning roughly one-third more per week than Wallace earned per month. It is useless to undertake to compare the purchasing power of a dollar in 1908 with the negligible purchasing power of the same unit of exchange in 1954. Wallace could have gone into any corner bar and got a five-cent schooner of beer and with it a very good free lunch. It is doubtful if Maynard, in all his adult life, ever saw a five-cent beer, much less a free lunch. Wallace

[13]Yazoo & M.V.R.R. v. Wallace, 91 Miss. 492, 45 So. 857 (1908).

could have bought a modest but altogether comfortable cottage, sufficient for his needs, for no more than two thousand dollars, which would cost Maynard ten or twelve thousand dollars. The depreciated value of our money in regard to damage verdicts was well expressed by the Florida court in 1947 in *Margaret Ann Super Markets, Inc. v. Scholl:*[14]

> "The degree of the negligence, the extent of the injury and its equivalent in labor and commodities, are the main criteria available to a jury to measure the amount of its verdict in a personal injury action. Jurors are not permitted to divine their judgments from the ether, they are realists and are not actuated by the philosophy of the cemetery. They get leads to their verdict from the tangible and the commonplace and it speaks in terms of what the dollar will buy, so it availeth little when cotton is 50 cents, corn $2.50, steak one dollar and common labor six dollars, to cite cases that were decided when cotton was five cents, corn was fifty cents, steak twenty-five cents and common labor one dollar. The disparity is such that a verdict or judgment so predicated looks capricious. It would be as reasonable to expect a carpenter to construct a house on the basis of prices that prevailed in 1939. Respect for law will not emerge from judgments so capricious."

More than thirty years ago, in *Laurel Light & Ry. Co. v. Jones,*[15] the Mississippi Supreme Court held the purchasing power of a dollar to be one of the many elements that may be properly considered by a jury in determining the number of dollars it requires to compensate for an injury. Just as the value of commodities fluctuates in the market place, so does the value of human life and limb fluctuate in the court room, for it is to the market place that the maimed and injured must take the dollars awarded him as a substitute for his earnings to purchase that which he otherwise would have purchased with his earnings.

Just before Christmas, 1927, Bettie Sharp, an employee of S. H. Kress Company in Meridian, tripped and fell on the steps of her master's shop and injured her back. On the trial of her case in April, 1929, there was a verdict in her favor for $25,000. On appeal, the court affirmed as to liability[16] but reversed and remanded the case for a new trial on the issue of damages. The court expressed its dissatisfaction with the proof because only chiropractors had treated the plaintiff, and none of them were produced as witnesses for her. The court noted that chiropractors are not physicians[17] and not therefore within the privilege of

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[14]159 Fla. 748, 34 So.2d 238 (1947).
[15]137 Miss. 143, 102 So. 1 (1924).
[16]S. H. Kress & Co. v. Sharp, 156 Miss. 693, 126 So. 650 (1930).
[17]Hayden v. State, 81 Miss. 291, 33 So. 653 (1903).

physicians,[18] but failed to note that in these circumstances, these witnesses were equally available to the defendant. On retrial of the case after remand there was a verdict for $40,000. On the second appeal[19] the court found that the verdict was so excessive as to evince bias and passion on the part of the jury and entered a remittitur of $15,000. Thus Miss Sharp got, almost exactly four years after her injuries and after intensive litigation, $25,000.

Let's compare the $25,000 award to Miss Sharp in 1930 with the $75,000 recovered by George Clayton Clardy in 1954.[20] The injuries of Miss Sharp are not to be compared with what the court characterized as the "terrible injuries" suffered by Clardy. The latter, a twenty-two-year-old man, had, at the time of his injuries, a life expectancy of forty-one years; he was earning $250 a month, and his medical expenses, past and reasonably to be expected, were $13,000. The commuted value of his life expectancy, without allowing anything for further development of skill and capacity, was $58,103.70. At once it is seen that for great pain and suffering, horrible disfigurement, and permanent personality changes, Clardy got less than $4,000.

The readjustment period beginning in 1929 following the unbridled inflation of the Roaring Twenties has become so notorious as to be commonly referred to as the Great Depression. It is not an exaggeration to say that measured in purchasing power of the necessities of life, Miss Sharp's $25,000 was equivalent to $100,000 in 1954, and that actually Clardy got less than Sharp.

It may not be here amiss to observe that insurers apparently consider all verdicts excessive and so much so as to evince bias, passion, and prejudice on the part of the jury. If it is desired to have a judge recuse himself, it is necessary to file a written motion therefor and particularize wherein such judge is incompetent to hear the case because of having prejudged it, having an interest in the outcome thereof, being related to one or more of the parties, or the like. What might well happen to counsel who charged in such a motion that the presiding judge was corrupt will not be speculated upon here. Nevertheless, it is a common occurrence for insurers to charge jurors, called unwillingly from their

[18] MISS. CODE ANN. § 1697 (Supp. 1954).

[19] S. H. Kress & Co. v. Sharp, 159 Miss. 283, 131 So. 412 (1930). An interesting thing about this case is that it was actually tried three times. Being unable to go upon and examine the property of the defendant, the plaintiff filed a suit based somewhat upon conjecture as to the lighting conditions at the time the plaintiff was injured. On trial the various witnesses whom the plaintiff knew would testify for the defendant were placed on the stand and thoroughly examined, after which a voluntary nonsuit was taken, the costs paid and another declaration immediately filed. All of the painstaking effort and work which went into this case is a tribute to the perseverance and determination of the brilliant advocate who managed the case for the plaintiff.

[20] 4-County Elec. Power Ass'n v. Clardy, 73 So.2d 144 (Miss. 1954).

daily tasks to serve for a mere pittance in the trial of controversies of signal importance, with bias, prejudice and corruption.[21]

It would seem to a thoughtful observer that if these charges of bias, prejudice, and corruption are true in any appreciable number of cases in which they are urged, occasionally conclusive proof could be offered definitely particularizing what caused who to be biased or prejudiced and certainly who was the instrument of corruption. Once proven, swift and effective corrective measures could and presumably would immediately follow, sufficient in their severity to discourage others from doing likewise. If, on the other hand, they are but the fertile imaginations of dissatisfied litigants, they should be treated accordingly.

Because we in Mississippi have less income, are paid less wages and altogether are the poorest people in the American Union, we must expect to recover less for loss of earnings, past and future, than is normally expected elsewhere. A six-bits-an-hour laborer is worth less when killed or permanently maimed than is his counterpart in other sections of the country who earns $2.50 an hour, albeit they each perform identical tasks. On the other hand, pain and suffering, the cost of necessary hospital and medical attention, artificial limbs, and the like which may be definitely proven, loss of society and companionship and counsel and advice in death cases, personality changes, and, since *Vascoe v. Ford*,[22] disfigurement,[23] are worth as much in Mississippi as in Florida, California, Illinois, or New York.

The personality changes element of damages is one that has been for many years overlooked in this jurisdiction, but it was emphasized and commented upon in the *Clardy* case. Just as the loss of a limb may be, and frequently is, followed by a phantom fixation, so is it altogether probable that serious injuries may well result in permanent personality changes, especially where there is horrible disfigurement. Following serious injuries and complete recovery, it is a common occurrence for an average, well-adjusted person to become morose, irritable and aggressive, or, on the other hand, retiring, timid and vacillating. When there is a personality change it becomes a valuable element of damages for which recovery may be had.

The measure of damages for pain and suffering was, in *Biedenharn*

[21]Welsh v. Morgan, 82 So.2d 820 (Miss. 1955). Interestingly enough, this case involved an award of little more than $800 to a plaintiff who, without dispute, had numerous bruises about his body, had been made nervous, had a pre-existing disease aggravated, and had lost between ten and fifteen dollars a day because of inability to follow his trade, that of a carpenter.

[22]212 Miss. 370, 54 So.2d 541 (1951).

[23]In 1947 there was a verdict for $87,575 for a disfigured nose. Johnston v. Long, 30 Cal. 2d 54, 181 P.2d 645.

Candy Co. v. Moore,[24] said to be "what a reasonable man would consider as fair compensation therefor—what the jury, as reasonable men, so consider and a jury's verdict so determining will not be disturbed unless it evidences passion, prejudice or corruption. . . ." The quoted language, in recent years, has been given meaning by many of the ablest trial judges in the nation. Space will permit brief quotations from two representative opinions from widely separated areas, one from a state and the other from a federal judge. In an order overruling a motion to reduce a $300,000 verdict returned in 1952 in *Wilson v. Allied Chemical & Dye Corp.*,[25] Judge Vincent Giblin said in part:

> "It is contended that the jury's award of $300,000 is so excessive as to show that the jurors were influenced by passion, prejudice or other improper motive. The jury was composed of an insurance agent, a plastering contractor, an employee of the Eastern Air Lines, a laundryservice man, a plumber, and a carpenter.[26] It was, in my opinion, a representative jury the members of which were governed by no motive except the purpose to consider the evidence and determine the issues fairly, impartially and conscientiously. Their exoneration of the corporate defendant, Allied Chemical & Dye Corporation, is indicative of the jurors' unprejudiced attitude.
>
> "Counsel for the movants characterize the jury's award as 'shockingly excessive,' and they insist that, if a new trial is not to be accorded because of the asserted passion, prejudice or other improper motive of the jury, a new trial should be granted unless there should be a remission of excess damages. Counsel, however, have afforded me no enlightenment as to the amount of the claimed excess, nor have they assigned any reason, other than their expressed surprise and shock, why I should substitute for the jury's award my estimate or computation of the amount of damages which should be allowed. The jury's award, I am told, is the largest made in a personal injury action in the history of Florida jurisprudence. That fact, however, is no reason for my requiring its reduction."

In overruling a similar motion in *Naylor v. Isthmian S. S. Co.*,[27] in which there had been a verdict for $115,000, of which $40,000 was for ten hours of conscious pain and suffering, District Judge Ernest W. Gibson, formerly Governor of Vermont, answered this contention with forceful language:

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[24]184 Miss. 721, 186 So. 628 (1939).

[25]District Court, Dade County, Florida.

[26]Florida allows only six jurors in a civil case. FLA. STAT. ANN. § 54.14 (1943).

[27]United States District Court for the Southern District of New York, August 18, 1950.

"This is a court created by a free people for the equal protection of all. It is in truth the people's court. The jury are the country. It is not a court set up under a tyrant or a dictator; a court slyly designated as a 'People's Court.' It is not a court whose judges will lose their heads if a case is not decided as the tyrant wills. It is a court that is neither subservient to the state nor to the individual or corporation. It is a court dedicated to preserve the freedom of the individual; dedicated to pass on the right or wrong of contentions between individuals.

"The pain inflicted on an individual which is caused by the wrong doing of another is no less to a poor man than to a millionaire. It is most difficult to assess. In the absence of intemperance, passion, partiality or corruption—and there is none evident in this case--I am not one to say that terrific pain inflicted on a seaman for ten hours is not worth $40,000—when a jury of free men and women calmly, carefully and deliberately so decide."

Unless the record discloses bias, prejudice or corruption on the part of the jury, their award for pain and suffering should not be disturbed; and the mere amount of the verdict is no evidence whatever of bias, prejudice or corruption. If such exists, it can and should be otherwise shown.

Damages for Wrongful Death

Our Wrongful Death Statute[28] has had a tortured course. Not one reported case in Mississippi reflects an award in a death case even approaching adequacy.

In the beginning, the court held the statute to mean exactly what it says, that is, that the party suing "shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit." The quoted language is capable of but one interpretation, and that is that recovery may be had for every element of damages for which the deceased might have recovered had death not ensued, and in addition thereto, such damages as may have been sustained by the parties interested in the suit. The latter must, perforce, include loss of love and affection, and counsel and advice for the death of a husband, especially where there are surviving minor children. The damages to the deceased must necessarily include pain and suffering between the injury and death, plus the net cash value of the

[28]MISS. CODE ANN. § 1453 (Supp. 1954).

life. This is precisely what the court held in 1906 when it decided *Cumberland Tel. and Tel. Co. v. Anderson*,[29] there saying: "[I]n a suit of this sort by the mother the extent of recovery, before majority of the killed, is the value of the services of the child from the time of death up to majority, plus such damages as the jury may fairly award as compensation for the physical and mental anguish endured by the child killed between the injury and death, to which must also be added any such gratuities as the evidence may show the mother had a reasonable expectation of receiving before or after majority, and also whatever sum the son might have recovered as the present value of his own expectancy. These four elements of damage are all proper."

The reasoning of this case was followed by the court in *Mississippi Cotton Oil Co. v. Smith*[30] and in *Gulf & S.I.R.R. v. Boone*.[31] Eighteen years after the *Anderson* case, the court had before it *Belzoni Hardwood Co. v. Cinquimani*.[32] It is said that hard cases make bad law. This case had many ramifications, and on the third trial of the case in a county to which the venue had been changed, the trial judge limited recovery to the single item of pain and suffering. The supreme court affirmed this action of the trial court. Thereafter, and until *Gordon v. Lee*,[33] counsel for plaintiffs avoided life expectancy like the plague and proceeded on other elements for which recovery might unquestionably be had, not the least of which was contributions reasonably to be expected by parents, widows, and minor children. In the latter case, the court went back to the *Anderson* case and, after quoting with approval from it, adopted the language used in *New Deemer Mfg. Co. v. Alexander*,[34] wherein it was held that parties suing for wrongful death had the right to sue for the value of the life and also for the value of pain and suffering between the injury and death. The court said that by the use of the word "also," it was meant to include in addition to the value of the life the "other elements of damages which are properly to be considered, without the same being pyramided." Since the recent decisions in *Sandifer Oil Co. v. Dew*[35] and *Bush v. Watkins*[36] this plain interpretation of an unambiguous statute, one would think, is permanently and finally at rest. Although there have been in Mississippi other verdicts more nearly approaching adequacy,[37] the *Dew* case verdict is the most adequate one

[29] 89 Miss. 732, 41 So. 263 (1906).
[30] 95 Miss. 528, 48 So. 735 (1909).
[31] 120 Miss. 632, 82 So. 335 (1919).
[32] 137 Miss. 72, 102 So. 470 (1924).
[33] 208 Miss. 21, 43 So.2d 665 (1949).
[34] 122 Miss. 859, 85 So. 104 (1920).
[35] 71 So.2d 752 (Miss. 1954).
[36] 80 So.2d 19 (Miss. 1955).
[37] In the Harrison County Circuit Court there was a recent verdict for $307,060 for the wrongful death of a wife and mother which was set aside by the trial judge; and in Yazoo County in the case of Elzey v. Union Producing Co., there was a verdict for $125,000 for the death of an oil field worker.

to reach the Mississippi Supreme Court. That the $90,000 awarded for the death of this fourteen-year-old child was grossly inadequate is at once apparent from a reading of the court's delineation of the injuries sustained by her which resulted in her death ninety-nine and one-half hours later, during seventy-five or eighty of which she was fully conscious. The court commented that "we have not been able to find any case which approaches the horror described in this one." The court noted that in the *Cinquimani* case $5,000 had been allowed for no more than six hours of pain and suffering, and that using this as a criterion, the same element in the *Dew* case was worth a minimum of 62,500 1924 dollars, which would be a minimum of twice that amount in 1954 dollars. So that for pain and suffering alone, there probably should have been a recovery of at least $125,000 in the *Dew* case. This child had a life expectancy of approximately fifty-two years and left surviving sisters, brothers, and parents with life expectancies ranging from twenty-eight to fifty years. In short, there was partial compensation only for pain and suffering and none whatever for punitive damages although the child's death resulted from the grossest sort of negligence, nothing for loss of society and companionship, and no award whatever for doctor and hospital bills. In other jurisdictions, the verdict might well have been twice that in this case.[38]

In 1934 the surviving husband and minor children of Mrs. Ora Carr recovered a judgment for $27,500 for her wrongful death, easily the equivalent of $75,000 today. An interesting feature of the case was the insistent urging of the appellants that it was error to permit the young children of the deceased to take the witness stand and testify as to her character and fitness as a wife and mother and to the nature and character of the services rendered by her in the discharge of her marital and maternal duties. In affirming *Standard Coffee Co. v. Carr*,[39] the court made this observation: "These minor plaintiffs had a right to be in court, in the presence of the jury, . . . [and their testimony] as to their relation to the deceased, her character, habits of industry, and attitude toward the children, and her fitness as a mother, was competent." If there was ever any doubt as to the admissibility of such evidence, there certainly has been none since the decision in this case. Loss of parental guidance, advice, and love and affection by a child, especially one of tender years, is an element for which recovery may be had, and by common observation and experience, a most valuable one.

Although not a death case, *Mississippi Cent. R.R. Co. v. Smith*[40] presented for decision whether $25,000 was, in 1936, excessive for certain in-

[38]Summerville v. Smucker, 280 App. Div. 839, 113 N.Y.S.2d 868 (2d Dep't 1952).
[39]171 Miss. 714, 157 So. 685 (1934).
[40]176 Miss. 306, 168 So. 604 (1936).

juries sustained by an unemployed married woman. The court very sensibly held that the gravamen of recovery for this one element was the loss of capacity to earn rather than loss of actual earnings.

No attempt has been made here to digest even an appreciable number of decisions dealing with the quantum of damages in personal injury and wrongful death cases, but, on the other hand, all that has been attempted was to bring into focus a relatively few decisions of our own court as to the various elements for which recovery may be had, at the same time emphasizing the present-day value of these elements, bearing always in mind the creeping inflation of the times which daily diminishes the purchasing power of the dollar.

Conclusion

The individual personal injury plaintiff has no advocate except in the courtroom. As a class, it is about the only unorganized group in this country. Despite repeated warnings from multiple safety organizations, no one expects that the next collision may be his. "The life you save may be your own" is almost a futile warning. One of Mississippi's greatest advocates used to eloquently proclaim that tragedy daily walks at the elbow of us all. Unlike the insurers, injured persons, present and prospective, have no propaganda machine. Full page advertisements in the nation's most popular and widely circulated magazines and periodicals directly appealing to prospective jurors not to require insurers to pay their honest obligations were a common occurrence within the last year. The same appeal appeared in articles by paid writers and propagandists in other forms of so-called literature.[41] When persons interested in the truth undertook to reply to one of these articles, they were told by the publisher that is was not the sort of material in which he was interested, even though it was in reply to an article which contained all sorts of misinformation, exaggerations, and outright falsehoods. The primary appeal seems to be that if juries return and courts affirm verdicts based on actual damage, insurance rates will be materially increased.

Some of these articles are highly critical of the methods used by plaintiff's advocates, especially the increased use of demonstrative evidence. No one ever criticized a solicitor for the use of charts, diagrams, and blackboards in a land line case in the chancery court. So, likewise, has there been a lack of criticism of the commercial lawyer for the use of notes, books of account, and the like in the suits of tradesmen. There is nothing new about demonstrative evidence. Well over a century ago a Massachusetts lawyer destroyed the testimony of a prevaricating witness by handing him a human skull and asking him to point out thereon the

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[41] *The Personal Injury Racket*, Reader's Digest, January 1955.

place from which the witness had said a blood vessel protruded. In 1920 in the trial of Ernest Fritz for murder, a brilliant New York advocate. William J. Fallon, brought into a New York court room the taxi cab in which the deceased, Florence Coyne, was alleged to have been slain, and had the defendant get into the automobile and demonstrate how the incident happened. Demonstrative evidence has been in constant use for decades; it has been publicized but recently.

For the purpose of liability rates, Mississippi is divided into several classes. In the lowest of these classes, for rates purposes, a standard bodily injury liability policy for a standard risk may be had for a $16 annual premium for $5,000-$10,000 coverage. This coverage, of course, is wholly inadequate and may be increased to $100,000-$300,000 for $24.64. For areas in which the higher premiums are collected, comparable coverage may be had for $23 for $5,000-$10,000, and $35.42 for $100,000-$300,000.

Every American citizen who appears in court as a litigant, whether in a personal injury case or not, is entitled to and should receive justice under the law. The personal injury plaintiff goes to court for money and not for sympathy. He is entitled to as much money, whether it be a large or a small amount, as will fully compensate for such wrongful injuries as he may have sustained. More than this, no litigant should expect; less than this, no litigant should have.

COMPARATIVE NEGLIGENCE IN MISSISSIPPI†

*Dan H. Shell and Cary E. Bufkin**

Mississippi's first comparative negligence statute was passed in 1910. Older members of the bar say that the statute was the brain child of a small group of damage suit lawyers who were constantly facing verdicts directed for the defendants arising out of the common law bar of contributory negligence. The original act[1] applied only to personal injury and death cases. Ten years later the act was amended to include actions brought for injury to property.[2] That portion of the act which deals specifically with contributory negligence reads as follows:

> "Contributory negligence no bar to recovery of damages—jury may diminish damages—in all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."[3]

Under statutes such as the above, one of the first questions reasonably to be anticipated is whether the act is constitutional. Shortly after the enactment of the original act, its constitutionality was tested in a case[4] wherein a railroad switchman sought recovery for a serious foot injury sustained while attempting to push an alleged defective drawhead into place. Upon the jury returning a substantial verdict for the plaintiff, the defendant appealed, contending that the uncontradicted evidence showed that plaintiff was likewise guilty of negligence, and that, therefore, the lower court erred in granting instructions authorizing diminution of damages proportionately and, likewise, in refusing to grant instructions which would preclude recovery should the jury find that the plaintiff was guilty of any negligence proximately contributing to the injury. Two bases of unconstitutionality were urged:

> 1. That the statute virtually divested the constitutional courts of jurisdiction by conferring judicial power on the jury, in violation of article six of the Mississippi Constitution of 1890; and

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†Adapted from an address given at the Arkansas Law Institute, October 1955.

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[1]Miss. Laws 1910, c. 135.

[2]Miss. Laws 1920, c. 312.

[3]Miss. Code Ann. § 1454 (1942).

[4]Natchez & S.R.R. v. Crawford, 99 Miss. 697, 55 So. 596 (1911).

2. That the statute violated either the due process clause or the equal protection clause of the Constitution of the United States.

In dealing with the first contention, that is, divestiture of judicial function, the court stated:

> "Under the Constitution courts have become vested with the judicial power to determine the questions of the legal sufficiency of the evidence to establish the rights of the parties at issue, and to apply the law to the facts when found, and this power cannot be withdrawn from them and conferred on juries. Did the Legislature intend by the provisions of . . . this act to confer judicial power, vested in the court, on the jury? It declares: 'In all cases under this act the question of the negligence and contributory negligence shall be for the jury.' In their general sense the words are but a declaration of the law as it exists, namely, that, when the court has found that there is legal evidence tending to show negligence or contributory negligence, it is for the jury to determine from the evidence adduced whether negligence or contributory negligence exists. This interpretation of the provision does not name a change in the law, and cannot affect the rights of any person."

The court then went further in pointing out that the statute is merely declaratory of the common law in providing that "all questions of negligence and contributory negligence shall be for the jury to determine." In this connection it was said that there could be no question of negligence or contributory negligence for the jury, except issues of fact:

> "The court has the power, which cannot be taken from it, to determine the legal sufficiency of the evidence as tending to establish negligence or contributory negligence. The language, 'all questions,' means questions of fact—issues of fact—are for the jury. If the evidence never reaches the point of raising issues of fact to be determined, then there is no question for the jury. This section has reference to the issues of fact to be submitted to the jury, under the provisions of Section 1 of the act. The only change made in the common law by this statute is that in the class of actions referred to in Section 1 contributory negligence on the part of the plaintiff is no longer a bar to recovery, but may only be used against him by the defendant in mitigation of damages."

Thereupon, the court pointed out that if the plaintiff's evidence does not tend to establish negligence on the part of the defendant, there is no question of fact for the jury to determine and the court may direct a verdict for the defendant.

With reference to the claim that the statute violates the due process clause or the equal protection clause of the Constitution of the United States, the court made the short but definite statement that the statute is clearly within the police power of the state. "The statute makes a classification of all actions for personal injuries. This classification is based on reason and justice, and is not a discrimination in favor of defendants in other character of actions."

As to whether or not it is permissible for the legislature to invade the realm of the common law to either abolish or modify it, our court commented upon this point in a death action where one of the beneficiaries had been contributorily negligent in causing the death of the party on whose behalf the action was brought.[5] The court held that "contributory negligence as a defense in an action for a tort is grounded on the common law rule that the law will not apportion the consequences of concurring acts of negligence. This rule may be modified or abolished by statute, and that is what the statute here under consideration has done insofar as the contributory negligence of the person benefited thereby is concerned."

The legislature saw fit to refer to "contributory negligence" instead of "comparative negligence." Therefore, it would appear that consideration should be given to what constitutes "contributory negligence." In a recent case[6] the defendant requested an instruction under our comparative negligence statute authorizing the jury to take into consideration "any negligence on the part of the deceased child." In upholding the action of the lower court in refusing the instruction, it was held that the instruction was defective in failing to set forth the elements of such negligence, if any, and its proximate contribution to the injury. An excellent definition of contributory negligence was given in a recent Mississippi case:[7]

> "Contributory negligence arises when, but not until, the injured person by his own conduct has done something, or has omitted to do something, which contributes to the particular event, and at the particular time and place, which was the immediate cause of the injury."

In another Mississippi case,[8] a sawmill employee sought recovery against his employer for the loss of three fingers severed by a saw. The pertinent facts were:

"The employee was directed in the course of his employment to

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[5]Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920).
[6]Stevenson v. Robinson, 37 So.2d 568 (Miss. 1948).
[7]Saxton v. Rose, 201 Miss. 814, 29 So.2d 646 (1947).
[8]Walker Bros. v. Nix, 115 Miss. 199, 76 So. 143 (1917).

> hold a log on the carriage while the same was being sawed. . . . At the time of the injury the employer was operating a boiler in which the inspirator had failed to work satisfactorily, and the water became low, and there was great danger apprehended that an explosion might occur, and at the time of the injury the boiler was making a noise, and on account of the apprehension and the noise plaintiff was looking at the boiler, and the log ran on the saw at the place where he was holding and severed three fingers. . . ."

The defense was that the employee was negligent in not looking at what he was doing and that such negligence was either the sole proximate cause or a contributing cause of the injury. The court held that the evidence showed that plaintiff's attention was attracted away from his duties by reason of the negligent operation of the boiler in its known dangerous condition and that plaintiff was not guilty of contributory negligence.

Contributory Negligence Distinguished From Assumption of Risk

In considering the distinction between assumption of risk and contributory negligence, it is interesting to note pertinent Mississippi legislation. The doctrine of assumption of risk was, in effect, abolished as to railroad employees by section 193 of the Mississippi Constitution of 1890.[9] In 1898 the legislature sought to abolish the doctrine as to all corporations,[10] but the act was declared unconstitutional.[11] In 1910 the legislature abolished contributory negligence as a bar and introduced comparative negligence as hereinabove stated, and in 1914 abolished the doctrine of assumption of risk in master and servant situations with two exceptions.[12] In 1948 the enactment of the Mississippi Workmen's Compensation Law eliminated the defense as to employees entitled to its coverage.[13]

In 1934 the Mississippi Supreme Court had before it a situation in which a passenger procured an employee of the defendant to serve as a chauffeur for a given trip. The passenger stated that he would not take the trip except upon condition that the servant speedily make the journey. After the trip was under way the passenger protested against the dangerous speed and continued to protest but did not quit the car. The defendant contended that the passenger had assumed the risk. The

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[9]See MISS. CODE ANN. § 7806 (1942).
[10]Miss. Laws 1898, c. 66, § 1.
[11]Bradford Constr. Co. v. Heflin, 88 Miss. 314, 42 So. 174 (1906).
[12]MISS. CODE ANN. § 1456 (1942). Conductors and locomotive engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them were excepted from operation of the statute.
[13]MISS. CODE ANN. §§ 6998-04, 6998-05 (1942).

court stated that although there were limited exceptions, the doctrine of assumption of risk ordinarily appertained only to contractual relations, but that that was a matter of academic interest only because it was clear that what the defendant was presenting under his contention belonged to the general classification of contributory negligence, which, under the comparative negligence statute, was available only by way of diminution of damages and not by way of bar plea. Since the jury was instructed at the request of the defendant to take the contributory negligence of the plaintiff into consideration in arriving at their verdict, this was all to which the defendant was entitled on this feature of the case.[14]

In spite of the above pronouncement, the same court recently held that a passenger in an automobile had assumed all risk and thereby had divested himself of a cause of action when he continued to ride with a driver who made several stops to purchase and consume intoxicants, each time giving more and more evidence of the effect of his imbibing.[15] The court distinguished between assumption of risk and contributory negligence as follows:

> "We reach, therefore, the distinction between assumption of risk and contributory negligence as known to the common law. 'Assumption of risk,' sometimes called 'incurred risk,' applies when a party voluntarily and knowingly places himself in such a position, or submits himself to such a condition, appreciating that injury to himself on account thereof is liable to occur at any and all times so long as such position or condition continues. Contributory negligence arises when, but not until, the injured person by his own conduct has done something, or has omitted to do something, which contributes to the particular event, and at the particular time and place, which was the immediate cause of the injury. The distinction has been tersely said to be that assumption of risk is 'venturousness' on the part of the person injured, while contributory negligence is his 'carelessness'."

Affect Upon Doctrine of Last Clear Chance

In considering our comparative negligence statute, we must necessarily consider whether it affects older theories of law such as the doctrine of last clear chance. In approaching the problem, we should reflect upon what need brought last clear chance into existence, what service it has rendered, and whether now, in view of our comparative negligence statute, it still has a service to perform.

[14]Watson v. Holeman, 169 Miss. 585, 153 So. 669 (1934).
[15]Saxton v. Rose, 201 Miss. 814, 29 So.2d 646 (1947).

The common law barred a plaintiff from recovery where he was himself contributorily negligent—where his own negligence, however great or small, had some causal connection with the occurrence out of which his damage flowed. The unnecessary harshness of this doctrine in many situations is obvious. Thus, the stage was set for the growth of the law, and there evolved the doctrine of last clear chance. Under this concept, an injured plaintiff, in order to recover damages from the defendant, must show that the defendant might have, by the exercise of reasonable care and prudence, avoided the consequence of the injured party's initial negligence, thereby side-stepping the harsh consequences of the rule prohibiting recovery where contributory negligence on the part of the plaintiff was involved.

The doctrine originated in the celebrated English case of *Davies v. Mann*.[16] "The plaintiff in that case fettered the front feet of his donkey, and turned him into the public highway to graze. The defendant's wagon, coming down a slight descent at a 'smartish' pace, ran against the donkey, and knocked it down, the wheels of the wagon passing over it, and the donkey was killed. In that case Lord Abinger, C. B., says: 'The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there. But, even were it otherwise, it would have made no difference, for, as the defendant might by proper care have avoided injuring the animal and did not, he is liable for the consequences of his negligence, though the animal might have been improperly there.' While Park, B., says: 'Although the ass might have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on the public highway, or even a man lying asleep there, or probably running against the carriage going on the wrong side of the road.' "[17]

Until passage of our comparative negligence statute in 1910, Mississippi had paid homage to last clear chance in several cases.[18] But, since the effective date of the comparative negligence statute, last clear chance has been conspicuous in its absence in any of the cases within our research. The question thus arises whether we still have a need for the doctrine of the last clear chance. Our comparative negligence statute purports to embrace "all actions" and to provide that "contributory negligence shall not bar recovery." Under the strict and literal interpretation of the language of our act, contributory negligence, where appli-

[16]10 M. & W. 546 (Ex. 1842).

[17]Fuller v. Illinois Cent. R.R., 100 Miss. 705, 56 So. 783 (1911).

[18]See, *e.g.*, Fuller v. Illinois Cent. R.R., *supra* note 17; Christian v. Illinois Cent. R.R., 12 So. 710 (Miss. 1893).

cable, can never bar a recovery in *some amount* by the injured plaintiff.

Thinking further through this matter, however, one begins to have some concern as to the fate of a theory of law enabling one to recover before the act regardless of the measure of contributory negligence. Keeping in mind the fundamental theory that statutes in derogation of the common law are to be construed strictly and jealously, can we say, in the absence of judicial pronouncement, that the legislature intended to or did abolish the doctrine of the last clear chance? It would appear that we might just as easily take the position that a defendant who has the last clear chance to avoid an accident is still under a duty to do so. In light of the absence of any judicial pronouncement on this problem since enactment of our comparative negligence statute in Mississippi, one is forced to theorize that the Mississippi Bar has accepted comparative negligence as a complete substitute for both contributory negligence and last clear chance. Although forty-five years have passed without a pronouncement on this subject in Mississippi, there is no cause to accept this as final. We may reasonably anticipate that the problem will be raised in the future.

Negligence Must Be Chargeable Against the Defendant

Although comparative negligence is a boon to plaintiffs, they still have the burden of making out a case of negligence against the defendants. If the evidence shows as a matter of law that the sole proximate cause of an accident was the plaintiff's negligence, he is unable to recover, and the defendant has a right to an instructed verdict.[19] Thus, the comparative negligence statute has no application when the negligence of the plaintiff is the sole proximate cause of his injury.[20] When plaintiff's negligence goes to the entire cause of action, the issue is not contributory negligence and does not effect a mere diminution of damages.[21]

If the proof is sufficiently strong and substantially without dispute that the plaintiff was guilty of some negligence which proximately contributed to his injury, the defendant is entitled to a peremptory instruction that the plaintiff was guilty of contributory (comparative) negligence as a matter of law. Thus, where the undisputed evidence showed that a decedent saw a train and was struck by it while attempting to pass immediately in front of it, the defendant was entitled to an instruction that the jury should apportion the damages in accordance with the com-

[19]C. C. Moore Constr. Co. v. Hayes, 119 F.2d 742 (5th Cir.), *cert. denied*, 314 U.S. 642 (1941); Ragland v. Native Lumber Co., 117 Miss. 602, 78 So. 542 (1918).

[20]Mississippi Export R.R. v. Summers, 194 Miss. 179, 11 So.2d 429, *suggestion of error overruled*, 11 So.2d 905 (1943).

[21]Stewart v. Kroger Grocery Co., 198 Miss. 371, 21 So.2d 912 (1945).

parative negligence statute.[22] Furthermore, and in line with general principles of negligence and procedure, where the undisputed testimony showed that the plaintiff was blameless of any negligence proximately contributing to the accident, he was entitled to a peremptory instruction that the jury should not diminish his damages.[23]

Is the Statute Substantive or Procedural Law?

This question was specifically answered by the Fifth Circuit Court of Appeals in *Mississippi Power & Light Co. v. Whitescarver*.[24] In order to understand the entire decision, it should be pointed out that the original act of our legislature provided, in addition to the above quoted provision, that "all questions of negligence and contributory negligence shall be for the jury to determine."[25] In the *Whitescarver* case the court held:

> "Section 511 of Mississippi Code of 1930 provides that the negligence of the person injured shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to him. Section 512 is that all questions of negligence and contributory negligence shall be for the jury to determine. We agree with appellant's contention that the latter section is not binding in a federal court, but deals with the functions of judge and jury as to which federal courts have their own organization and as to which state law is without effect. [citations omitted]. Section 511, on the contrary, is a part of the substantive law of the state under which the homicide occurred, and by which the case concerning it must be tried. 28 USCA § 275."

Does Gross Negligence of Plaintiff Bar Recovery When Negligence of Defendant Is Only Slight?

The cases on this particular question are plain and unambiguous.[26] It has been held[27] in construing the statute that:

> "This statute is plain, unambiguous, and easily construed. Prior to its passage contributory negligence—any contributory negligence, slight, ordinary, or gross, if negligence can in fact be so classified—barred a recovery, and the manifest legislative pur-

[22]Hudson v. Louisville & N.R.R., 30 F.2d 391 (5th Cir. 1929).
[23]Trewolla v. Garrett, 200 Miss. 563, 27 So.2d 887 (1946).
[24]68 F.2d 928 (5th Cir. 1934).
[25]Miss. Code Ann. § 1455 (1942).
[26]Yazoo & M.V.R.R. v. Carroll, 103 Miss. 830, 60 So. 1013 (1912). See also McClellan v. Illinois Cent. R.R., 204 Miss. 432, 37 So.2d 738 (1948); Magers v. Okolona, Houston & Calhoun City R.R., 174 Miss. 860, 165 So. 416 (1936); Mississippi Cent. R.R. v. Robinson, 106 Miss. 896, 64 So. 838 (1914); Cumberland Tel. & Tel. Co. v. Cosnahan, 105 Miss. 615, 62 So. 824 (1913).
[27]Yazoo & M.V.R.R. v. Carroll, *supra* note 26.

> pose of enacting it was simply to alter the rule on this subject, which had been established by the court, so that such negligence should not thereafter bar recovery, but should simply cause a diminution of the amount thereof. This statute does not deal with, and was not intended to introduce into our jurisprudence, degrees of contributory negligence, but it deals with contributory negligence proper of every character."

Regardless of the above quoted rule, the courts, as a practical matter, do inquire into situations wherein the negligence of the plaintiff is gross as distinguished from mere negligence on the part of the defendant and in such situations frequently order a remittitur. A case illustrating this point is *Yazoo & M.V.R.R. v. Williams.*[28] $15,000 was claimed for personal injuries and auto destruction arising out of an auto and train collision at a crossing. Jury verdict and judgment for $10,000 were entered in the lower court. The supreme court found that the undisputed evidence showed that the appellee undertook to cross the railroad track without first looking or listening for the approach of appellant's train, that the appellee was guilty of gross negligence, and further that the jury failed to diminish the damages on this account. The court held that the plaintiff would have been barred from recovery without the aid of the comparative negligence statute and that in accepting the benefits of the statute he could not ignore the latter provision contained therein that "damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured." A reduction in judgment to $5,000 was therefore ordered.

What Is the Magic Formula of Diminution?

In *Tallahala Lumber Co. v. Holliman,*[29] decided in 1921, Holliman asked damages of $20,000 for personal injuries. The evidence made it clear that the jury might well have found the plaintiff contributorily negligent. Counsel for the plaintiff, in his closing argument to the jury, remarked that:

> "If the jury believe the plaintiff would, if not negligent, be entitled to receive $40,000, that in this case they should return a verdict for $20,000."

Defense counsel's objection to this statement was overruled. The jury returned a verdict for $18,000. The supreme court held that the above statement of plaintiff's counsel was manifestly erroneous, that the objection to it should have been sustained, and the jury instructed to disregard it. However, the court felt that since the written instructions to

[28]114 Miss. 236, 74 So. 835 (1917).
[29]125 Miss. 308, 87 So. 661 (1921).

the jury on the questions of negligence and contributory negligence were correct, the jury probably was not misled, and the statement did not warrant reversal. But the court was convinced that the plaintiff was contributorily negligent, and that the amount of recovery had not been diminished by the jury in proportion to the amount of negligence attributable to him, and it ordered reduction of the judgment to $12,500.

More recently the court considered an instruction which read as follows:

> "The court instructs the jury for the defendant that if you believe from the evidence that plaintiff and defendant were equally negligent, then it is your duty to find for the defendant."

It was held[30] that this instruction was erroneously granted and that the defendant would not be absolved from liability altogether, if both were equally negligent, but that plaintiff's damages would be reduced by fifty percent in such instance.

Last year the Mississippi Supreme Court considered an automobile collision case involving an accident in a sharp curve.[31] The lower court granted the following instruction for the defendant:

> "The court instructs the jury for the defendant that it was incumbent on both drivers to have operated their cars at such a rate of speed and under such control that each could bring [his car] to an immediate stop in an emergency and the court instructs the jury that it is your sworn duty to return a verdict for the defendant if from the evidence you believe both parties were equally negligent in the operation of the cars, which negligence equally contributed to the proximate cause of the collision."

This instruction was held a violation of the comparative negligence statute; and the court observed that the defendant would not be absolved from liability altogether even if both were negligent equally, but that plaintiff's damages would be reduced by fifty percent.

May One Guilty of Contributory Negligence Maintain an Action Against a Municipality for Injuries Arising Out of Use of Its Streets?

The general rule in Mississippi is that a municipality owes the public the duty to exercise ordinary care to keep its streets reasonably safe for the use of persons exercising reasonable care and caution. In the cases sought to be maintained against municipalities for negligence in the maintenance of their streets, the municipalities have set up the de-

[30]Wilburn v. Gordon, 209 Miss. 27, 45 So.2d 844 (1950).
[31]Carruth v. Griffis, 71 So.2d 478 (Miss. 1954).

fense that one who is guilty of contributory negligence proximately contributing to the accident and resulting injuries has not exercised reasonable care and caution for his own safety and that, therefore, under the above stated rule, these individuals are precluded from maintaining an action. The Mississippi Supreme Court has not recognized this defense, but has held that the comparative negligence statute requires submission to the jury of the questions of negligence and contributory negligence.[32]

An interesting situation arose under the comparative negligence statute in the city of Jackson. The city zoo had taken a bear from its cage and had staked it with a chain outside of any enclosure. The bear, while being fed by the plaintiff and many other park visitors, suddenly turned on plaintiff and bit and clawed her. One ground upon which the city defended the inevitable personal injury suit was that the injuries sustained by the plaintiff were the sole and proximate result of her own negligence. The court held that under the comparative negligence statute the questions of negligence and contributory negligence were for the determination of the jury.[33]

Master and Servant Relationship

In discussing this particular phase of the problem, we are obviously making no mention of cases coming within the purview of the Workmen's Compensation Law. We have heretofore pointed out that Mississippi has abolished the rule of assumption of risk under the master and servant relationship with one or two minor exceptions. The comparative negligence statute was found to be applicable where a fourteen year old employee in an oyster canning factory brought suit for injuries claiming that his employer was negligent in failing to furnish a reasonably safe place in which to work. The employer pleaded, among other things, that the employee stepped into a hole, of the presence of which he was aware, causing the injury. The supreme court held that the comparative negligence statute was applicable.[34] It has also been held in Mississippi that the comparative negligence statute does not abrogate the common law simple tool doctrine.[35]

As a general rule, by virtue of the comparative negligence statute and the statute abolishing assumption of risk in employer and employee relationships, when once negligence has been shown on the part of the

[32]Owens v. Town of Booneville, 206 Miss. 345, 40 So.2d 158 (1949); City of Meridian v. King, 194 Miss. 162, 11 So.2d 205, *suggestion of error overruled*, 11 So.2d 830 (1943); Birdsong v. City of Clarksdale, 191 Miss. 532, 3 So.2d 827 (1941); Gould v. Town of Newton, 157 Miss. 111, 126 So. 826 (1930).

[33]Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861, 42 A.L.R. 254 (1925).

[34]Sea Food Co. v. Alves, 117 Miss. 1, 77 So. 857 (1918). See also Hardy v. Turner-Farber-Love Co., 136 Miss. 355, 101 So. 489 (1924).

[35]Jones v. Southern United Ice Co., 167 Miss. 886, 150 So. 652 (1933).

master followed by injury to the servant, the only way the master can entirely escape liability is to show that his negligence was not a proximate cause of the injury, or as expressed another way, that the servant's own negligence or the negligence of a fellow servant was the sole proximate cause of the plaintiff's injury.[36]

Can a Minor Be Guilty of Contributory Negligence?

It has been held that a fourteen-year-old boy who leaped from a wagon and who was injured while attempting to cross a road in the path of an oncoming car could be guilty of contributory negligence and that a verdict for $400 was not inadequate when it was considered that the boy's negligence was great and the negligence of the defendant was slight.[37]

A more difficult problem was presented in the case of *Johnson v. Howell*,[38] in which the plaintiff was a child eight years old. The lower court instructed the jury:

> "The court instructs the jury for the defendant that if you believe from the evidence that the plaintiff, Bobby Howell, from his age, intelligence, knowledge and experience has sufficient discretion to be charged with negligence and if you further believe from the evidence that the plaintiff, Bobby Howell, was guilty of negligence which contributed to the injury, then the court instructs you that any damages which the plaintiff has sustained shall be diminished in proportion to the amount of negligence attributable to the plaintiff."

In dealing with the above instruction, the supreme court held that as a general proposition contributory negligence is an affirmative defense and the burden is on the defendant to prove it. The burden is even greater, however, in the case of a minor child between the ages of seven and fourteen years. Such a child is prima facie presumed not to be possessed of sufficient discretion to make him guilty of contributory negligence in failing to exercise due care for his own safety. This presumption may be overcome by proof, in which event it becomes a question of fact for the jury, but such proof must show the exceptional capacity of the child and his possession of judgment in a degree removing him from the class of infants presumptively incapable of exercising discretion.

A minor under the age of fourteen years employed in violation of the state Child Labor Law is not chargeable with contributory negli-

[36]Oakes v. Mohon, 208 Miss. 478, 44 So.2d 551 (1950).
[37]Pounders v. Day, 151 Miss. 436, 118 So. 298 (1928).
[38]213 Miss. 195, 56 So.2d 491 (1952).

gence so as to require reduction of damages under our comparative negligence statute.[39]

Is the Statute Applicable Solely to Personal Injury or Property Damage Claims?

Suit was brought for damages to credit and reputation in a situation where a bank dishonored several checks which the plaintiff had drawn. It was shown that the plaintiff had made out a check for eight dollars in one of the blanks and for eighty dollars in another of the blanks. The bank cashed the check on the basis of eighty dollars thereby depleting plaintiff's deposits. Subsequent checks drawn by the plaintiff were therefore dishonored. When suit was brought for damages to credit and reputation, the bank sought an instruction under the comparative negligence statute. The supreme court held that the instruction was erroneous for the reason that the comparative negligence statute was not applicable to a suit based upon a breach of contractual obligation.[40]

Nor does the act apply to a case grounded upon fraud. Plaintiff's suit for damages for fraud and deceit was founded upon false representations in the sale of certain Delta farm lands, it having been claimed that the defendant represented to the plaintiff that there were 5,000 acres of cultivatable lands within the protection of the Mississippi River levee when in fact there were approximately 3,000 acres. The court stated that a purchaser has a right to rely upon the representations of a seller as to facts within the latter's knowledge, and the seller could not escape responsibility by showing that the purchaser, upon inquiry, might have ascertained that such representations were not true. Contributory negligence was held specifically not to be a defense in an action based on fraud.[41]

Conflicts of Laws

Plaintiff was injured in an accident in Louisiana. Subsequently she moved to Mississippi where she instituted suit in a Mississippi court. The defendant sought an injunction to prohibit the suit in Mississippi on the ground, among others, that contributory negligence is a complete defense in Louisiana and only a pro tanto defense in Mississippi. The Mississippi Supreme Court held that it is sufficient response to that contention to say that the courts of this state will apply the substantive law of Louisiana, including that pertaining to contributory negligence, in the trial of the case in Mississippi.[42]

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[39]Hartwell Handle Co. v. Jack, 149 Miss. 465, 115 So. 586 (1928).
[40]Weaver v. Grenada Bank, 180 Miss. 876, 179 So. 564 (1938).
[41]Reed v. Charping, 207 Miss. 1, 41 So.2d 11 (1949).
[42]Tri-State Transit Co. v. Mondy, 194 Miss. 714, 12 So.2d 920 (1943).

Pleading and Procedure

Since contributory negligence is an affirmative defense, it should be pleaded if relied upon.[43] The defendant has the burden of proof of establishing the defense of comparative negligence so as to have the benefit of its application.[44] Furthermore, if the defendant wishes the benefit of an instruction to the jury that the jury may take the comparative negligence of the plaintiff into consideration in arriving at its verdict, then the defendant must specifically request such instruction from the court.[45] His failure to request an instruction on this issue relieves the jury of the legal obligation to consider comparative negligence so that it would be possible for the jury to return a verdict for full damages even though the testimony indicated that the plaintiff undoubtedly had been guilty of some comparative negligence.[46] On the other hand, even though contributory negligence is not pleaded as a special defense, and even though no instruction is obtained directing the jury to take comparative negligence into consideration in arriving at its verdict, it is not reversible error for the jury to bring in a verdict which, from its very nature, leads to the conclusion that the jury did consider the comparative negligence of the plaintiff in arriving at its verdict. This is true, obviously, in only those cases wherein the proof is sufficiently clear to authorize the jury to find comparative negligence against the plaintiff.[47]

Consider an instruction which provides:

> "The court instructs the jury for the plaintiff that if you believe that the plaintiff was guilty of contributory negligence, still, under the law this shall be no defense in this case, if you further believe from the evidence that the defendant was guilty of negligence which proximately contributed to plaintiff's injury."

This instruction was held fatally defective because it provided that contributory negligence was "no defense." It was stated that contributory

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[43]Railway Exp. Agency, Inc. v. Mallory, 168 F.2d 426 (5th Cir. 1948); Jefferson Funeral Home v. Pinson, 219 Miss. 427, 69 So.2d 234 (1954); Moore v. Abdalla, 197 Miss. 125, 19 So.2d 502 (1944); Gulf & S.I.R.R. v. Saucier, 139 Miss. 497, 104 So. 180 (1925); Illinois Cent. R.R. v. Handy, 108 Miss. 421, 66 So. 783 (1914).

[44]Railway Exp. Agency, Inc. v. Mallory, *supra* note 43; Gulf & S.I.R.R. v. Saucier, *supra* note 43; Yazoo & M.V.R.R. v. Lucken, 137 Miss. 572, 102 So. 393 (1925).

[45]Railway Exp. Agency, Inc. v. Mallory, 168 F.2d 426 (5th Cir. 1948); Jefferson Funeral Home v. Pinson, 219 Miss. 427, 69 So.2d 234 (1954); Robinson v. Colotta, 199 Miss. 800, 26 So.2d 66 (1946); Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So.2d 527 (1943); Morrell Packing Co. v. Branning, 155 Miss. 376, 124 So. 356 (1929); Gulf & S.I.R.R. v. Saucier, 139 Miss. 497, 104 So. 180 (1925); Yazoo & M.V.R.R. v. Lucken, *supra* note 44; Alabama & V. Ry. v. McGee, 117 Miss. 370, 78 So. 296 (1918); Lindsey Wagon Co. v. Nix, 108 Miss. 814, 67 So. 459 (1914); Illinois Cent. R.R. v. Handy, 108 Miss. 422, 66 So. 783 (1914).

[46]Cases cited notes 32, 33, and 34 *supra*.

[47]Gilliam v. Sykes, 216 Miss. 54, 61 So.2d 672 (1952); Morrell Packing Co. v. Branning, 155 Miss. 376, 124 So. 356 (1929).

negligence is a partial defense and bars the right of a plaintiff to recover a proportion of the damages which might be attributable to his own negligence. A defense to a cause of action is any fact or state of facts which will defeat it in whole or in part, or in other words, any matter which tends to diminish the amount of recovery or to entirely defeat the cause of action.[48]

A very interesting situation arose in a case reported in 1936.[49] There an action originally had been brought arising out of an automobile and train collision. On the first trial damages were recovered in the amount of some $11,000. There seemed to be little question but that the jury might properly consider the comparative negligence of the plaintiff. When the case first came before the supreme court, a remittitur was ordered reducing the judgment to $7,000. Upon the plaintiff refusing to accept the remittitur, the case was retried on the issue of damages alone. On the retrial the plaintiff, over objection of defense counsel, again put on the entire case as to the facts involving the collision itself, not restricting the proof to the element of damages alone. On the second trial a verdict for $25,000 was returned. The appeal was based upon alleged error in allowing introduction of proof as to liability. In affirming the action of the lower court in allowing this proof to be introduced, the supreme court held that all of the facts which entered into the determination of damages were admissible in evidence. Inasmuch as the defendant contended that the plaintiff was guilty of contributory negligence, proof as to all facts, including facts of liability, was appropriately introduced. Incidentally, it was held that the $25,000 verdict was now proper and not excessive, since the proof now showed that the injuries sustained by the plaintiff were of a much more permanent nature than when the case was first tried.

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[48]Waterford Lumber Co. v. Jacobs, 132 Miss. 638, 97 So. 187 (1923).

[49]Mississippi Cent. R.R. v. Smith, 176 Miss. 306, 168 So. 604, *appeal dismissed*, 299 U. S. 518 (1936).

AUTOMOBILE LIABILITY COVERAGE UNDER THE NATIONAL STANDARD AUTOMOBILE POLICY†

*John P. Faude**

Automobile liability insurance probably is chiefly responsible for the fluid and rapid development of casualty insurance since the turn of the century, and automobile liability coverage serves as the best mirror of the principles of casualty insurance and casualty insurance law, and their frequent change with the times. While workmen's compensation and employers' liability insurance is slightly older, that was more of a specialty field which from the first was closely tied to state statutes and other types of local regulation. The need for stability and statewide uniformity caused the workmen's compensation and employers' liability policy, once developed, to tend to remain static, and not until 1954 did there occur the only revision of such policy in nearly forty years.

Development of Liability Insurance

Automobile liability insurance is a direct outgrowth of teams liability insurance and, like all early liability insurance, was patterned on the older established forms of property insurance. From property insurance was inherited the indemnity principle and "to indemnify" policy language, with unfortunate consequences. The indemnity principle made excellent practical and moral sense for property insurance, but just as it had not made for sense in life insurance, so it made for imperfect sense in liability insurance. This was revealed in two main respects:

1. The insured might be forced to finance the cost of tort litigation and defray resulting judgments before being able to call on the company for reimbursement. Not only was this a distinct hardship to insureds, but if they proved insolvent the company realized a complete windfall.

2. After an accident, it was possible for the company to act in concert with the insured, the company retroactively cancelling the policy for a price far below the potential judgments, leaving nothing for the claimants.

There were enough instances of these applications of strict indemnity in the legal liability field to dramatize that the injured person had as much or more at interest than the insured, which lead to legislation in many states and to interpretive court decisions in others[1] whereby liability insurance became fixed or "absolute" as of the occurrence of

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[1]Commercial Cas. Ins. Co. v. Skinner, 190 Miss. 533, 1 So.2d 225 (1941).

the accident. Meanwhile, considerable resentment was aroused within the general and the insuring public, and by 1930 most of the principal writers were writing outright liability policies which omitted any references to "indemnify."

The National Standard Automobile Policy

The advance of the "automobile age" in turn advanced the prevalence of automobile liability insurance, and with it the claims consciousness of the public. In time, public authorities became displeased at so much variety in the scope and wording of the policy forms of the different companies, and certain states seriously considered requiring local standard policies, in the public interest. This spurred efforts, already underway with the bureau or "organization" companies, to agree on a satisfactory common policy for countrywide use, for otherwise the different requirements of the different states would have produced an impossible administrative situation, especially for interstate risks. Further, if the statutory form of the standard fire policy was a precedent, local standard policies might be expected to hamper the free development of improved coverage.

The spring of 1935 saw the first countrywide "standard provisions" policy being promulgated concurrently by the stock and mutual casualty companies belonging respectively to the National Bureau of Casualty Underwriters and the American Mutual Alliance, after much intensive work and study in cooperation with the American Bar Association and certain state insurance departments. "Standard provisions" meant that the language of the analogous parts of a policy was uniform, but there were no rigid requirements as to sequence or arrangement, and there might optionally be omitted certain coverages and their related provisions.

In 1941, through additional collaboration with the National Automobile Underwriters Association, standard provisions were produced for fire, theft, collision and the other physical damage coverages for use separately or in combination with the automobile liability coverages. The resulting policy form has come to be known and referred to as the National Standard Automobile Policy. The subsequent twenty years have attested to the practicality and success of this uniform but flexible policy, since it is still in general use by insurers of all sorts in their present writing of thirty-six million cars at an annual premium of four billion dollars.[2] Further, the policy has kept abreast of competitive and

[2]In recent months several "independents" also have prepared special policies, designed primarily for individual insureds and their private passenger automobiles. Because such special policies are designed for the needs of a uniform type of risk, a slightly broader basic coverage and greater simplicity of policy form are made possible. A new "standard provisions" counterpart may be expected shortly, thereby continuing for the insuring public the advantages of uniformity of approach.

other developments by undergoing periodic revision, the latest last April, thus continuing adapted for use throughout the United States and Canada.

Insuring Agreement I—Coverage

The automobile liability policy, as any liability policy, affords two main areas of protection:

1. Payment of legal damages, up to the policy limits; and
2. Defense of claims and suits at the company's expense.

Insuring Agreement I sets forth separate, elective coverages, each reciting the company's obligation of payment and describing the specific hazard that is insured.

Coverage A—Bodily Injury Liability[3] is the first and most important coverage. It will be noted that the grant of coverage now runs expressly to "payment of damages, legally obligated" and makes no reference to "indemnify." This protection is flexible and tracks whatever is the insured's liability at law, whether limited (as under a guest law, or by charitable or governmental status), or newly created during the term (as where by statute or court decision a wife becomes entitled to consortium damages).

The coverage runs to damages, as distinguished from fines, injunctive relief, or special process. The courts of all states now recognize that insurance which protects a motorist from the unintended civil consequences of behavior which was intentional or even criminal is not repugnant to public policy.[4] The damages covered are those *because of* certain injuries, thus making it clear that consequential as well as other resultant damages are included.[5] Affirmative mention of "damages for care and loss of services" occurs in the Limits of Liability condition[6] to

[3]"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile." Basic Automobile Liability Form (5th rev. 1955).

[4]*Cf.* Messersmith v. American Fidelity Co., 232 N.Y. 161, 133 N.E. 432 (1921), where the insured had allowed an unlicensed person to drive his car.

[5]Previously such damages had sometimes been held outside the coverage, under "damage *for* bodily injury" policy language. See Brustein v. New Amsterdam Cas. Co., 255 N.Y. 137, 174 N.E. 304 (1931).

[6]"The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person as the result of any one accident; the limit of such liability stated in the declarations as applicable to 'each accident' is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss time resulting therefrom, sustained by two or more persons as the result of any one accident." Basic Automobile Liability Form (5th rev. 1955).

of services, arising out of bodily injury, sickness or disease, including death at any

further resolve any doubt on the point.

The term "bodily injury" is used to distinguish mental anguish, humiliation, or anything else amounting to a "personal injury." The express statement that bodily injury "includes death resulting at any time" serves to dispel any thought that a resulting death must occur during the policy term.

Observe the requirement that the injuries be *caused by accident.* This limitation was designed to require that there be a distinct event which is unintentional from the standpoint of the actor[7] or insured, and thus avoid a trend in the decisions just prior to 1935 interpreting "injuries accidentally sustained" from the standpoint of the victim only.[8] The Assault and Battery condition[9] further bears out the intent here.[10] As a device to distinguish and exclude injuries which were accidentally caused over a period of time, the term "caused by accident" has proven only partly successful, and thereby a bone of contention, particularly in liability insurance other than automobile. In the automobile field these so-called "exposure" types of case have few examples—bus fumes, damage by vibration, damage by overweight vehicles.

The foregoing relates to the "general hazard" of any modern bodily injury liability coverage. The "specific (automobile) hazard" is described as "the ownership, maintenance, or use of the automobile." The most important and debated word here is "use"—first, as to what accidents properly are attributable to *use* of the car,[11] then, as to the meaning to be given *use* by reason of its being defined to include "loading and unloading" of the automobile. Through the years, this meaning has broadened considerably. Thus, a New York court denied coverage in 1936 when a taxi driver scraped the wall of a hallway in carrying a trunk to his cab;[12] by 1951, a New York court was holding in favor of coverage where moving a piano into a house damaged a gas valve, causing a leak and resultant explosion.[13] A majority of jurisdictions now favor such a

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[7]U.S.F. & G. Co. v. Wilson, 184 Miss. 823, 185 So. 802 (1939).

[8]Commercial Cas. Ins. Co. v. Tri-State Transit Co., 190 Miss. 560, 1 So.2d 221, 133 A.L.R. 1510 (1941), continued such an interpretation even under the new language, influenced by earlier assault cases.

[9]"Assault and battery shall be deemed an accident unless committed by or at the direction of the insured." Basic Automobile Liability Form (5th rev. 1955).

[10]Robinson v. U.S.F. & G. Co., 159 Miss. 14, 131 So. 541 (1931).

[11]Merchants Co. v. Hartford Acc. & Indemnity Co., 187 Miss. 301, 192 So. 566 (1939), where poles were used to extricate a truck from a ditch and then were abandoned, causing a later accident, held covered; National Mut. Cas. Co. v. Clark, 193 Miss. 27, 7 So.2d 800, 140 A.L.R. 927 (1942), where a taxi driver left his cab and assaulted a patron over a fare dispute, held not covered.

[12]*In re* Consolidated Indemnity & Ins. Co., 161 Misc. 701, 292 N.Y. Supp. 743 (S. Ct. 1943).

[13]Muller v. Sun Indemnity Co., 276 App. Div. 1028, 96 N.Y.S.2d 140 (2d Dept.), *aff'd,* 302 N.Y. 634, 97 N.E.2d 760 (1951).

test of "completed operations" here, in place of the earlier "coming to rest" rule which undoubtedly was closer to the original intent.

Coverage B—Property Damage Liability[14] operates similarly to the bodily injury liability coverage, except that its "general" hazard is "injury to or destruction of property, including the loss of use thereof." The latter clause is intended to make clear that there is coverage for what amounts to "injury to property" even though there was no physical damage to property, as in the case of an overturned truck which blocks access to premises, with resultant loss of their use.

Insuring Agreement II—Defense, Settlement, Supplementary Payments

This agreement affords the second principal area of protection of a liability policy, the company's obligation to defend and to defray the cost of liability suits against the insured.[15] It gives rise to the following sub-topics:

1. The interdependence of the obligations of payment and defense. The reason a liability insurance company is entitled, as well as obligated, to undertake the defense is because the company has its own stake in the outcome of a suit against its insured by reason of its obligation as to a resulting judgment.[16] Conversely, an unqualified agreement

[14] "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile." Basic Automobile Liability Form (5th rev. 1955).

[15] "With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) (1) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the insured in the event of accident or traffic law violation during the policy period, not to exceed $100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(2) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(3) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

(4) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request;

and the amounts so incurred, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy." Basic Automobile Liability Form (5th rev. 1955).

[16] "The validity of agreements of insurance companies, in insurance policies insuring against liability, to defend actions against the insureds, is universally recognized, such actions, which are brought for the purpose of fixing the liability insured against." This is so because the companies have vital interests of their own in the defense of General Serv. Corp. v. Allhoff Bros., 139 S.W.2d 1062, 1064 (Mo. App. 1940).

to afford legal defense, irrespective of whether the company had a stake in the outcome, would amount to an agreement for the corporate practice of law, which would be illegal under the statutes or public policy of every state. With great unanimity, the courts have recognized the proper interdependence of the allied obligations of payment and defense, and have excused the company from both, in cases falling outside the scope of the policy coverage.[17]

2. The obligation of defense as established by the allegations of the complaint. The general rule has been stated: "An insurer's duty to defend an action against the insured is measured by the allegations in the plaintiff's pleadings, and if such pleadings state facts bringing the injury within the coverage of the policy, the insurer must defend, irrespective of the insured's ultimate liability to the plaintiff."[18] That is, where the alleged facts are covered there is a duty to defend, although the actual facts be excluded, and proof of the actual facts would establish non-liability as a matter of law.[19] Measuring the duty to defend by the plaintiff's allegations frequently amounts to no more than requiring the defense of groundless (but literally covered) suits,[20] but this is required, nonetheless, by express language.[21] The company also stands obligated to defend in the reverse type of case, where the alleged facts are excluded but the true facts are known to the company and would be covered.[22] Therefore, the company must defend if either the alleged or the known facts would be covered.

3. The obligation of defense upon exhaustion of the applicable limits. Where the insurer ceases to have a stake in the outcome by reason of the exhaustion of the applicable policy limit, some courts have inclined to the view that the defense obligation is independent of the obligation to pay.[23] The position of most company underwriters may be summarized as follows:[24]

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[17]See U.S.F. & G. Co. v. Wilson, 184 Miss. 823, 185 So. 802 (1939); and Commercial Cas. Ins. Co. v. Tri-State Transit Co., 190 Miss. 560, 1 So.2d 221, 133 A.L.R. 1510 (1941), which seem to have supplanted the earlier doctrine of U.S.F. & G. Co. v. Cook, 181 Miss. 619, 179 So. 551 (1938). The only real exception recently is Hoosier Cas. Co. v. Chimes, Inc., 95 F. Supp. 879 (E.D. Mich. 1952), which relied upon City Poultry and Egg Co. v. Hawkeye Cas. Co., 297 Mich. 509, 298 N.W. 114 (1941), although the latter had stood repudiated since Duval v. Aetna Cas. & Surety Co., 304 Mich. 397, 8 N.W.2d 112 (1943).

[18]8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4683 (1941).

[19]Goldberg v. Lumber Mut. Cas. Ins. Co., 297 N.Y. 148, 77 N.E. 2d 131 (1948).

[20]*Cf.* Boutwell v. Employers' Liab. Assur. Corp., 175 F.2d 597 (5th Cir. 1949).

[21]The "even if groundless" clause dates from the decision in Cornell v. Travelers' Ins. Co., 175 N.Y. 239, 67 N.E. 578 (1903), holding that a clear case of non-liability on the facts lay outside the policy coverage.

[22]Hardware Mut. Cas. Co. v. Hilderbrandt, 119 F.2d 291 (10th Cir. 1941).

[23]American Cas. Co. v. Howard, 187 F.2d 322 (4th Cir. 1951); American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 205 Misc. 1066, 131 N.Y.S.2d 393 (S. Ct. 1954).

[24]See Lumbermen's Mut. Cas. Co. v. McCarthy, 90 N.H. 320, 8 A.2d 750 (1939).

a. The company does not stand relieved of its defense obligations simply through tendering its applicable limit; rather, the company must undertake the defense, at least until an actual settlement of claims or payment of judgments has exhausted the limit.

b. At that point, the company should stand relieved of the defense obligation, provided this cannot conceivably be of prejudice to the insured, as respects further claims or suits.

This position is supported by the main introductory paragraph of the policy, which states the company's entire contractual undertaking as "subject to the limits of liability, exclusions, conditions and other terms of this policy." This question is currently undergoing study, with some thought being given to the ultimate desirability of a specific clause which would terminate the defense obligation at some definite time or point in relation to the exhaustion of the applicable limits.

4. The obligation of defense as including an obligation to appeal. There seem to be no case precedents under the modern liability policy, but the implications which follow from the language of this insuring agreement as a whole would suggest that there is not an obligation to appeal. (Malpractice liability and like specialty policies expressly require the insured's consent to a settlement, and thereby probably do create a duty of appeal). For the very reason that the obligation of defense should not be independent of that of payment, so a company should not have to wage an appeal when it lacks a stake in its outcome, as where the appeal could not alter the judgment to a figure below the policy limits.

5. The effect of negligent failure to settle within the policy limits. When such failure results in a judgment in excess of the limits, the company should be required to pay for such excess. The difficulty, and crux of the matter, is whether an adverse result should of itself be regarded as proof of such negligence. For many years, the general rule was to the contrary; rather, a demonstration of bad faith was essential to hold a company for a sum beyond the limit.[25] Of late the "Monday quarterback" school has attracted an increasing number of courts.[26]

6. The "supplementary payments" described in part (b) are, as stated therein, payable in addition to the applicable limits. Note in particular:

[25]Best Bldg. Corp. v. Employers' Liab. Assur. Co., 247 N.Y. 451, 160 N.E. 911 (1928); *accord,* Georgia Cas. Co. v. Cotton Mills Products Co., 159 Miss. 396, 132 So. 73 (1931).

[26]*Cf.* Dumas v. Hartford Acc. & Indemnity Co., 94 N.H. 484, 56 A.2d 57 (1947). This case is among the more extreme on its facts, the record indicating that the victim had been negligent, and the defendant not, so that the New Hampshire Supreme Court had difficulty in affirming the trial court's judgment.

a. The clear effort to create an obligation as to interest on the entire judgment (even so, some courts have concluded that it could not have been intended to pay interest on that part of the judgment beyond the limit);[27]

b. The provision for bail bond expense, applicable to traffic law violations as well as to accidents; and

c. The reimbursement coverage for immediate medical aid, applicable irrespective of liability or fault but only as to "covered" cases. "Immediate" does not serve to confine the time of treatment short of whatever amounts to the emergency period, as distinguished from convalescence.[28]

Insuring Agreement III—Definition of Insured

This agreement is a feature of the policy that is peculiar to automobile liability insurance.[29] This, the so-called "omnibus" clause, sets up two classes of insureds, (1) the named insured, and (2) the additional insureds: the resident spouse, any person while using the automobile, and anyone legally responsible for its use, provided the actual use be by the named insured or spouse or with the permission of either. Upon death of the named insured, the assignment condition provides for automatic continuance of the coverage to the surviving spouse, legal representatives, and persons having proper temporary custody.

These provisions illustrate how well this policy has become attuned to the practical facts of life. They recognize the normal manner in which automobiles are used today, and that automobile liability insurance on an "operator" basis would unrealistically necessitate additional policies and ignore the law of agency. Three principal topics have created insurance law, as to this provision:

1. The construction to be given the limitation concerning actual use with the permission of the named insured.[30]

a. Whether "actual use" is more restrictive than "use," and thus more calculated to achieve an interpretation that the use of the

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[27]Sampson v. Century Indemnity Co., 8 Cal. 2d 476, 66 P.2d 434 (1936); Home Indemnity Co. v. Corie, 206 Misc. 720, 134 N.Y.S.2d 443 (S. Ct. 1954), and cases cited therein.

[28]Laidlow v. Hartford Acc. & Indemnity Co., 254 N.Y. 391, 173 N.E. 557 (1931); Gilbert v. American Cas. Co., 126 W.Va. 142, 27 S.E.2d 431 (1943).

[29]"The unqualified word 'insured' includes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either." Basic Automobile Liability Form (5th rev. 1955).

[30]For general annotation, see 5 A.L.R.2d 600 (1949).

vehicle at the time of the accident was within the original contemplation and permission of the named insured.[31]

b. As to the extent that implied permission may be assumed, under the circumstances[32] (to employees or others).

c. Whether the use amounted to a sufficient deviation from the permitted use to avoid coverage; extension of permission by the permittee;[33] use by permittee in violation of express instructions.

There is a particularly wide divergence of view in the various state courts on this topic, the elaboration and analysis of which must be beyond the scope of these remarks. Oddly, there seems to be no Mississippi case law on the subject.

2. The potential breadth of the group of insureds who qualify under the clause regarding persons legally responsible for the use of the car. A recent case[34] points this up. A truck was being loaded with merchandise, and a checker employed by the shipper happened to bump into a pedestrian. The court held that the checker was an insured under the truckman's liability policy since the accident arose out of loading the truck, and that he was legally responsible for the accident. This result probably was not intended by the underwriters or policy draftsmen, particularly as it tends to shift concurrent "general liability" coverage onto the automobile liability policy where the latter's limits are sufficiently high. There appears no ready means of avoiding such result without narrowing the coverage as to the other cases which are intended of coverage.

3. The question as to whether "cross liability" coverage is intended as between various members of the insured class. A specific "severability" provision (condition 4)[35] now makes clear what always was the intent,[36] but which a few cases misconstrued, that the term "the insured" is used severally and not collectively, with the consequence that "the insured" as used in the exclusions and in the conditions applicable after loss means each insured against whom claim is made or suit is brought.

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[31]*Accord*, Gulla v. Reynolds, 82 Ohio App. 243, 81 N.E.2d 406 (1948); APPLEMAN, AUTOMOBILE LIABILITY INSURANCE (1938); *contra*, Haeuser v. Aetna Cas. & Surety Co., 187 So. 684 (La. App. 1939).

[32]See American Cas. Co. v. Windham, 26 F. Supp. 261 (M.D. Ga.), *aff'd* 107 F.2d 88 (5th Cir. 1939), *cert. denied*, 309 U.S. 674 (1940).

[33]Samuels v. American Automobile Ins. Co., 150 F.2d 221 (10th Cir. 1945), is an unusually "strong" case for the strict construction view.

[34]Wagman v. American Fidelity & Cas. Co., 304 N.Y. 490, 109 N.E.2d 592 (1952).

[35]"The term 'the insured' is used severally and not collectively but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability." Basic Automobile Liability Form (5th rev. 1955).

[36]Western Cas. & Surety Co. v. Aponaug Mfg. Co., 197 F.2d 673 (5th Cir. 1952), correctly recognized the severability; *cf.* Standard Surety & Cas. Co. v. Maryland Cas. Co., 199 Misc. 658, 100 N.Y.S.2d 79 (S. Ct. 1950).

This interpretation is especially important as to the employee and damage to property exclusions, and the conditions as to notice and co-operation.

Insuring Agreement IV—Automobile Defined
Insuring Agreement V—Use of Other Automobiles

These agreements contain a series of provisions having the effect of defining an "insured automobile" for the purposes of the policy. In addition to the described car, there qualify (a) any trailer, whether owned or borrowed, designed for use with a private passenger automobile, while not used for business purposes with any other type automobile; (b) temporary substitute automobiles, as defined;[37] and (c) a newly acquired automobile, whether by the named insured or the spouse, if a replacement of a described car or, subject to the thirty day notice requirement, an additional car, if the same company then insures all cars owned by the named insured or spouse.

What commonly is called the "Drive Other Cars Coverage" serves to extend the policy, when written for an individual or husband and wife, as respects any other car not owned by a member of their household, whether liability might attach because of their personal operation, or their agency responsibility (non-business), or the responsibility of others for their use. This coverage continues to apply, even after the described car may have been disposed of.

These several aspects of application of the policy to vehicles other than the described car are further illustrations of the quality of liability insurance when left to private, competitive development, instead of being controlled by statute as under the Massachusetts Compulsory Law.

Insuring Agreement VI—Policy Period, Territory, Purposes of Use

This agreement states the time and geographical bounds of the policy.[38] The usual time limitation, "accidents during the policy period," is possibly of less significance here than under some other forms of liability insurance, where more frequently there may be an appreciable interval between the act or omission and the resultant infliction of harm.

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[37]"An automobile not owned by the named insured or his spouse if a resident of the same household, while temporarily used as a substitute for the described automobile when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction." Basic Automobile Liability Form (5th rev. 1955).

[38]"This policy applies only to accidents which occur during the policy period, while the automobile is within the United States of America, its territories or possessions, or Canada, or is being transported between ports thereof and, if a 'described automobile' under Insuring Agreement IV, is owned, maintained and used for the purposes stated as applicable thereto in the declarations." Basic Automobile Liability Form (5th rev. 1955).

Exclusions

The exclusions[39] round out the scope of the coverage, and are now reduced to a minimum:

1. Public or livery conveyance use, replacing the older exclusion of "for a consideration;"[40]

2. Contractual. Traditional in liability policies, and of growing importance in the automobile field with the spread of long term lease arrangements;

3. Use of the "insured vehicle" coupled with another which is owned or hired by the insured and not covered by the company, the so-called "trailer exclusion:"

4. Injury to employees, except in domestic employment, and obligations under workmen's compensation or similar laws; and

5. The usual exclusion as to damage to property in charge of the insured, which now contains a recent exemption as to damage to a residence or private garage.

The reduced compass of these exclusions, and the absence of such earlier ones as to racing contests, violation of age, and rentals to others further illustrates the broader coverage which tends to result under non-legislative conditions, at the same time better supporting the objectives of the strict or security type of financial responsibility law.

The Effect on the Coverage of a "Security Type" Financial Responsibility Law

Financial responsibility laws of the strict or "security" type, such as Mississippi enacted in 1952,[41] distinguish between *automobile* liability

[39]"This policy does not apply:
(a) . . .while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy;
(b) . . .to liability assumed by the insured under any contract or agreement;
(c) . . .while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;
(d) . . .to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured; . . .
(f) . . .under coverage B, to injury to or destruction of property owned or transported by the insured, or property rented to or in charge of the insured other than a residence or private garage injured or destroyed by a private passenger automobile covered by this policy." Basic Automobile Liability Form (5th rev. 1955).

[40]Sunshine Mut. Ins. Co. v. Addy, 74 S.D. 387, 53 N.W.2d 539 (1952), surprisingly applied this exclusion to common carriage of cargo, contrary to intent. Repetitions of the decision are not expected.

[41]Miss. Code Ann. §§ 8285-01 to -41 (Supp. 1954).

policies, which may be offered in compliance with the law as security for possible damages in a *past* accident, and *motor vehicle* liability policies, which are certified policies filed as proof of *future* financial responsibility, as following convictions for certain violations of the Motor Vehicle Code.

The theory of a certified policy is that the policy in the first instance is primarily intended for the benefit of the victim, with the theoretical "right of reimbursement" keeping a solvent insured-defendant in line as to the proper duties of the insurance relationship. Such certified policies[42] are "absolute" in the sense that the defenses normally available to the insured are unavailable to deprive the victim of compensation. That is, neither fraud nor material misrepresentation, nor breaches of conditions subsequent to accident or loss, nor the exclusions may be matters of defense, save only the exclusions specifically contemplated by the law (workmen's compensation obligations and injuries to employees; damage to property in charge of the insured).

The noncertified policies, voluntarily purchased, remain subject to the normal defenses of the insurer, and to the normal duties of the insured,[43] and such presumably is true even as to the optional features of a certified policy.[44] The financial responsibility laws condition of the policy has sometimes been misapplied in this connection, and was amended recently to remove any ambiguity on the score.

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[42]*E.g.*, Miss. Code Ann. § 8285-21 (Supp. 1954).
[43]*Cf.* Travelers' Ins. Co. v. Boyd, 312 Ky. 527, 228 S.W.2d 421 (1949).
[44]*But see* Polonitz v. Wasilindra, 155 Pa. 62, 37 A.2d 136 (1944).

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STUDENT COMMENTS

Mississippi's Youth Court System*

The purpose of this article is to discuss the history and philosophy of youth courts, to compare Mississippi's youth court system with the systems of other states, and to observe Mississippi's youth court system in operation. Consideration of neglected children in the system and cooperation with other agencies are omitted. Since the Mississippi act is recent, there are few cases on the subject, and letters from judges and former judges of Mississippi Youth Courts are given as references.[1]

History and Philosophy

For over eighty years the need for specialized dealing with children coming before the courts has been realized. "In 1869 a Massachusetts law was passed to provide for a 'visiting agent' to sit in on hearings and advise judges regarding disposition of children under sixteen, specifically charged with the duty of working 'not for the punishment of the child, but for the child's welfare.' A year later provision was made for separate hearings for juveniles in Massachusetts."[2] Illinois, in 1899, established the first youth court in the United States.[3]

Mississippi passed its first youth court act in 1916.[4] The act provided that any reputable person having knowledge of a delinquent, destitute, or abandoned child could institute proceedings by filing a written petition with a chancellor or circuit judge. In 1940 the second Juvenile Court Act for Mississippi was passed,[5] creating a juvenile department of the chancery, circuit, and county courts, and giving each original jurisdiction over delinquent, dependent, and neglected children under eighteen years of age. Circuit and county courts before which the child was first brought could, in their discretion, transfer the case to the chancery court. As a result the circuit court frequently proceeded against juveniles criminally. To remedy that situation and provide for even better methods of dealing with children in the courts, the Youth Court Act of 1946[6] was passed.

The philosophy which gave birth to the trend toward specialized courts dealing with children is "that a child involved in delinquency is

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[1] A copy of each letter referred to in this article is on file with the *Mississippi Law Journal*. This information is available on request.

[2] Winters, *Modern Court Services for Youths and Juveniles*, 33 Marq. L. Rev. 103 (1949).

[3] 22 Soc. Serv. Rev. 242 (1948).

[4] Miss. Code Ann. §§ 7247-7271 (1930).

[5] Miss. Code Ann. §§ 7185-7213 (1942).

[6] Miss. Code Ann. §§ 7185-01 to -30 (1942).

in need of treatment rather than retributive punishment."[7] In discussing the Virginia Juvenile Court Law of 1950, Paul D. Brown said, "The law is remedial and gives powers necessary and incidental, legal or equitable to carry out the best welfare of the child."[8] In juvenile courts "[s]pecific acts are viewed as symptoms of trouble rather than as bases for societal retribution."[9] Paul W. Alexander, a leading juvenile court judge, compared the juvenile court to a hospital:

> "After diagnosis, medical science prescribes the proper treatment for the patient; after diagnosis, the court does the same thing for the child. The hospital doesn't treat symptoms. It doesn't try to cure the fever patient by locking him in a refrigerator. No more does the court treat symptoms. It doesn't try to cure the truant by locking him in a schoolroom."[10]

Consequently, it is the judge's duty to determine what can be done to help the child, not what punishment should be given for his act. For that reason juvenile court laws usually require an investigation of the child's history, environment, and mental and physical condition.[11]

There is a real need for individualized justice; it is no mere theory of sentimental social workers. "The character of any person, adolescent or adult, is the sum total of his potentialities for good and evil. In the case of the young offender, it may well be that he has prematurely realized all his potentialities for evil and has yet to develop the counteracting ones for good. If so, a program of treatment that provides maximum opportunity for fruition of under developed potentialities for good is likely in the long run to prevent recurrence of delinquent behavior. At the same time a program of punitive treatment might suppress and inhibit not only the evil but also the good potentialities and lead to abortive growth of a dangerous and embittered personality more likely than ever to commit crime."[12]

Comparison With Other Youth Courts

The definitions and terms used in most of the youth court acts are similar. The rule is to specify children as delinquent and neglected, not as felons or criminals.[13] In the Virginia statute passed in 1950 the definitions of delinquent and neglected are omitted; the new phraseology is "within the purview of the juvenile court law."[14] In England, the persons before the Children's Courts are children or young people accused of criminal offenses, those said to be beyond the control of their parents, or those in need of care or protection.[15] The older statutes

[7]CHILDREN'S BUREAU, U. S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 346, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN 4 (1954).

[8]Brown, *The Virginia Juvenile Court Law of 1950,* 8 WASH. & LEE L. REV. 18 (1951).

[9]Davis, *Iowa Judges and the Juvenile Court,* 34 IOWA L. REV. 634 (1949).

[10]Alexander, *Of Juvenile Courts and Judges,* NAT'L PROB. AND PAROLE ASS'N YEARBOOK 187, 191 (1947).

[11]22 SOC. SERV. REV. 243 (1948).

[12]Ludwig, *Considerations Basic to Reform of Juvenile Offender Laws,* 29 ST. JOHN'S L. REV. 234 (1955).

[13]Summers, *The Juvenile Court Act,* 12 MO. L. REV. 321 (1947).

[14]Brown, *supra* note 8, at 26.

[15]Henriques, *Children's Courts in England,* 37 J. CRIM. L. 295 (1946).

listed the specific conditions of delinquency and neglect.[16] Arkansas' 1911 statute contains so many offenses that "a strict interpretation of its provisions would make all children delinquent."[17] The Standard Juvenile Court Act merely describes a child in need of court protection and care without any specific definitions of a child within the purview of the act.[18] In essence, Mississippi follows the suggestion even though the description is in the section entitled "Definitions."[19]

The jurisdiction of various youth courts varies somewhat as to persons and types of cases. "In the United States age limits in existing specialized courts dealing with children's cases range from 16 to 21 years, with 18 years the upper limit adopted by the largest number of the states. A few states make the specialized court's jurisdiction concurrent with criminal courts as to children between 18 and 21."[20] In Mississippi exclusive jurisdiction is placed in the youth court[21] with discretion to transfer to the circuit court those children thirteen years of age or older charged with an offense which would be a felony if committed by an adult, except that the circuit court retains exclusive jurisdiction of such a child if he is charged with any crime which is punishable by life imprisonment or death.[22]

In some jurisdictions there are separate courts for adolescents. The adolescent court is for offenders sixteen to twenty-one, too old for the juvenile court, yet not old enough to be considered as true adults properly triable in the ordinary criminal court. Baltimore,[23] Chicago, Philadelphia, and New York City[24] are some of the places where separate courts for older youth offenders are established. There are several differences between the adolescent and the children's court. The children's cases are civil in nature; the adolescent court is more similar to the criminal court system. Considerations are different because the same standards of behavior cannot justifiably be applied to adolescent and child. Because of the newness of the adolescent court, the facilities for the treatment of children are more adequate. The statutes for adolescents are broader so as to facilitate adjudication when the court may wish to apply treatment to the case before it.[25]

Problems often arise when there is no exclusive jurisdiction in the specialized youth court. In Arkansas, for instance, the criminal courts still have jurisdiction over offenders over the age of twelve. Since there is concurrent jurisdiction, a criminal court judge could sentence a

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16See, *e.g.*, LA. REV. STAT. § 84 (1950).

17 Maxted, *Some Problems of Courts for Children in Arkansas*, 8 ARK. L. REV. 25 (1955).

18*Ibid.*

19MISS. CODE ANN. § 7185-02 (1942).

20CHILDREN'S BUREAU, PUB. NO. 346, *op. cit. supra* note 7, at 28.

21MISS. CODE ANN. § 7185-03 (1942).

22*Id.* § 7185-15. *But see* CHILDREN'S BUREAU, PUB. NO. 346, *op. cit. supra* note 7, at 27: "To take from the jurisdiction of the specialized court . . . cases in which children have committed offenses punishable by death or life imprisonment is to deny the basic philosophy of the specialized court."

23Miles, *The Youth Court of Baltimore: New Bricks with Old Straw*, 38 A.B.A.J. 727 (1952).

24Tappan, *Treatment Without Trial*, 24 SOC. FORCES 308 (1946).

25*Ibid.*

twelve-year-old to the electric chair. Another alarming fact is that a child can be before both courts on the same day for the same offense.[26] New York, one of the leaders in juvenile offender laws, faces the difficulty of overlapping jurisdiction.[27] In Mississippi under the 1940 Juvenile Court Act[28] the circuit court had concurrent jurisdiction. A study of the cases shows that it seldom released the child and committed him to the juvenile court once he came within the jurisdiction of the circuit court.[29] However, the 1946 act does not deny jurisdiction to the circuit court, but gives the youth court the power to certify the delinquents to the circuit court for appropriate proceedings.[30]

The 1946 act states that it shall not be construed as abridging the power and jurisdiction of the chancery court over the estates or guardians of minors.[31] Some youth courts have exclusive jurisdiction over other matters concerning children. Missouri's statute, fashioned after the Standard Juvenile Court Act, and those of California, Indiana, New Jersey, and the District of Columbia give their youth courts concurrent jurisdiction with probate courts in the appointment of guardians of the person of minors and guardians for mentally defective minors.[32] The Missouri Juvenile Court also determines fitness and unfitness in adoption cases.[33]

Sometimes it is necessary to detain a child until action can be taken. The need for secure custody has led to the practice of keeping children in jail. Therefore, the tendency in the newer statutes is that a child cannot be put in jail if there is a detention home.[34] Mississippi has authorized the cities and counties to provide detention homes,[35] but all too many children have experienced a night or more in jail.[36]

Whether before or after the filing of the petition, an investigation of the case is necessary. Mississippi,[37] Missouri,[38] and Virginia[39] provide that no petition shall be filed until the judge, after primary investigation, determines that the interest of the child or the public requires the court to take further action. However, the United States Children's Bureau

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26Maxted, *supra* note 17, at 26.

27"In one jurisdiction, New York for example, there may be as many as four separate courts in a single county with independent probation and guidance services that are authorized to dispose of a single case involving an older adolescent offender. Throughout the state there are over three thousand police justices and sixty city courts that have jurisdiction over criminal offenses by youth over sixteen in addition to the county and supreme court." Ludwig, *supra* note 12, at 236.

28Miss. Code Ann. §§ 7185-7218 (1942).

29McGinnis v. State, 201 Miss. 239, 29 So.2d 109 (1947); Lewis v. State, 201 Miss. 48, 28 So.2d 122 (1946); Farr v. State, 199 Miss. 637, 25 So.2d 186 (1946); Parker v. State, 194 Miss. 895, 13 So.2d 620 (1943).

30Gatlin v. State, 207 Miss. 588, 42 So.2d 774 (1949).

31Miss. Code Ann. § 7185-25 (1942).

32Summers, *supra* note 13, at 322.

33*Id.* at 323.

34See, *e.g.*, Waybright, *Florida's New Juvenile Court Act*, 6 Miami L.Q. 5 (1951).

35Miss. Code Ann. § 7185-06 (1942).

36In 1954, 408 children awaiting youth court hearings were detained in jail. State Dep't of Public Welfare, Youth Court Statistics 11 (1954).

37Miss. Code Ann. § 7185-05 (1942).

38Summers, *supra* note 13.

39Brown, *supra* note 8, at 24.

recommends that social investigation should begin with the filing of the petition, unless there is a reasonable doubt that the child was involved in a specific delinquent act. "In such cases, a court hearing should be held to determine whether or not he committed the act alleged and the social study should not be begun until this has been determined. . . . The social study may be compiled from a number of sources: the child and his family, medical, psychological or psychiatric reports, and records of social agencies, reports based on observation of the child while in detention, and the evidence of school teachers and others."[40]

Juvenile court proceedings are of a civil nature. "The proceeding is in no sense a criminal prosecution resulting in punishment to the minor. If it were, there would be an invasion of the right of trial by jury."[41] The proceeding in Mississippi is civil, with the care, protection, and rehabilitation of the child in question the foremost consideration. The proceeding is without jury and is conducted in an informal manner without regard to the usual procedures and rules of evidence.[42] In Arkansas, "[v]iolations of laws which, if committed by persons above statutory ages, would be misdemeanors or crimes, in juvenile court cases will be taken only as evidence in determining delinquency."[43] In Florida, the facts must be proved under the rules of evidence in use in equity cases.[44] One of the chief criticisms of the English children's court system is that there must be a strict adherence to the formal rules of evidence.[45]

One of the ways in which the juvenile courts cooperate to rehabilitate the child rather than punish him is in trying to remove the stigma of having a "record." The federal courts try to attain this goal by exercising informal supervision over the child unless the child cannot benefit from such unofficial action.[46] This method has been criticized as leaving to the judge so little power that he becomes a mere weak co-chairman with the youth counsellor. Florida attempts to meet this need by providing that juvenile court records shall not be open to public inspection;[47] such protection is the general rule.[48] Mississippi prohibits the publishing of names of the children from the youth court records;[49] and, generally, the child's record can never be used against him.[50]

Cases may be disposed of in several ways. In England the parents may be punished if they are responsible for the child's presence before the court.[51] Generally in the United States fines and reparation as well

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[40]CHILDREN'S BUREAU, PUB. No. 346, *op. cit. supra* note 7, at 50-52.

[41]Martin v. State, 213 Ark. 507, 211 S.W.2d 116 (1948).

[42]MISS. CODE ANN. § 7185-08 (1942).

[43]3 ARK. L. REV. 206 (1949).

[44]Waybright, *supra* note 34, at 6.

[45]Henriques, *supra* note 15, at 295.

[46]Meyer, *The "Brooklyn Plan" of Deferred Prosecution for Juvenile Offenders,* J. CRIM. L. 479 (1947).

[47]See note 34 *supra.* "It has been pointed out that whether official or unofficial, the record exists and may be used against the child. Greater protection with respect to the release and use of the legal records of the court would answer this objection." CHILDREN'S BUREAU PUB. No. 346, *op. cit. supra* note 7, at 43.

[48]Winters, *supra* note 2; Summers, *supra* note 13.

[49]MISS. CODE ANN. § 7185-20 (1942).

[50]*Id.* § 7185-09.

[51]Henriques, *supra* note 15, at 296-297.

as restitution may be required.[52] In Baltimore's Youth Court, when a child is fined for his delinquent act he must work for the money to pay the fine, and then he is allowed to spend it under the supervision of the probation officer.[53] The most generally used method of disposition is probation under expert supervision of the court.[54] This includes supervision by the parents, or a relative, or even a detention home if for the best interest of the child.[55]

If these methods do not correct the child, he is committed to a state institution. Even though an attempt is made to make this treatment beneficial, there is criticism from all sides. The complaint is made in England that the only recourse the court has when probation has failed is to send the offender to an approved school at the expense of the taxpayers. "As for the approved school training, the expense of this to the ratepayers can be relieved by a levy on the parents."[56] The greater amount of criticism, however, is pointed not at the system but at the facilities themselves. In Illinois, one of the main defects in the juvenile court law is that criminal courts may prosecute and punish both juveniles (under seventeen) and youths (seventeen to twenty-one). All juvenile offenders are sent to the reformatory rather than the penitentiary, but mass treatment, the principal criticism of penitentiary incarceration, still prevails in the reformatory; offenders merely escape association with adult criminals.[57] The training school in many instances is merely a "catch-all;" children may be sent there because there is no sufficient probation service,[58] or public sentiment may have demanded that they be taken out of town.[59] Mentally and physically handicapped children who get on the "wrong side of the law" are sent to the training school for want of better facilities. As a result they disrupt the program offered in the ordinary training school and hinder the individual treatment of all the children.[60] In Mississippi the deplorable truth is that even training schools are not provided for all offenders, so the jail is the only place to keep them.[61]

The method of appeal may be to the appellate court on the record, and that court decides only whether the lower court entered a lawful order and does not substitute its judgment for that of the juvenile court in discretionary matters.[62] The United States Children's Bureau recom-

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[52]Brown, *supra* note 8, at 25.

[53]Miles, *supra* note 23, at 730.

[54]Winters, *supra* note 2.

[55]See, *e.g.*, Davis, *supra* note 9, at 636 n.12.

[56]44 THE NEW STATESMAN 744 (1952).

[57]NOTE, *Youth Correction—The Model Act in Operation*, 17 U. CHI. L. REV. 693 (1950).

[58]"It's a great deal less expensive to keep a child in the community and provide good probation service than it is to support him in an institution, but we persist in the less economical way." CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 341, HELPING DELINQUENT CHILDREN 28 (1953).

[59]*Ibid.*

[60]*Id.* at 29.

[61]"There are no facilities for colored girls who are delinquent." Letter from Judge Lunsford Casey, July 2, 1955. "We need to have Oakley Training School enlarged so that we do not have to be placed on the waiting list for the commitment of negro boys; and it is a disgrace that we yet do not have a training school for delinquent negro girls." Letter from Judge Zelma W. Price, July 23, 1955.

[62]Waybright, *supra* note 34, at 8.

mends: "Appeals should be allowed to the proper appellate court on matters both of law and of fact on the basis of the verbatim report or a summary of such a report in narrative form, the petition, and the court's written findings and disposition."[63] Iowa has a novel procedure in its juvenile court system. Appeals have been abolished. Since the juvenile court action is not a trial for an offense, the lack of provision for appeal does not deprive the delinquent of any civil liberty or constitutional right.[64] The Mississippi statute provides for appeals to the supreme court where the chancery court is the youth court and to the chancery court where the county court is the youth court.[65]

The caliber of juvenile court personnel is of vital importance. In a jurisdiction where the youth court is only a division of some other court, the judge of that court automatically becomes the youth court judge. In England voluntary justices of the peace perform the work of the children's court.[66] In America, "[t]he leeway in our state laws for delinquent children makes it important that there be no abuse of the power entrusted to the juvenile court judge."[67] The judge should be a member of the bar and have experience in the state where he is to serve. He should be vitally interested in people and their problems, but where there is a trained staff of social workers on whose advice he may depend, training in the social sciences is unnecessary.[68] Many jurisdictions consider familiarity with child welfare essential.

> "In view of the fact that in some of our communities the persons who judge our delinquent children do not even have legal training, it may seem too much to ask that the juvenile court judge should also have knowledge of the sciences of human behavior. Yet, when we consider that the decision of the juvenile court judge often influences the entire course a young person's life may take, it seems but a slight requirement to make."[69]

A probation staff or youth counsellor is essential to the purpose and working of the juvenile court. Their selection should be made with scrupulous care.[70] The work of the probation officer is twofold. First,

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[63] CHILDREN'S BUREAU, PUB. No. 346, *op. cit. supra* note 7, at 60.

[64] Wissenburg v. Bradley, 209 Iowa 813, 229 N.W.2d 205 (1930).

[65] MISS. CODE ANN. § 7185-24 (1942).

[66] "In London the Panel of Justices is chosen by Britain's Home Secretary and the chairmen are appointed by him. Outside London the magistrates elect their own panel and their own chairmen. The Bench consists of three magistrates, one of whom must be a woman." Henriques, *supra* note 15, at 295.

[67] CHILDREN'S BUREAU, PUB. No. 341, *op. cit. supra* note 58, at 22.

[68] "The early insistence that the judge be 'an expert in the sciences of human behavior and in the art of adjusting human relations' arose from a misconception of the judicial function at a time when child care and treatment agencies were less well developed than they are today. While the court's decisions may relate to treatment and involve the judge's ability to understand, respect and evaluate expert opinion presented, the judge himself does not directly undertake or control treatment functions." CHILDREN'S BUREAU, PUB. No. 346, *op. cit. supra* note 7, at 84.

[69] CHILDREN'S BUREAU, PUB. No. 341, *op. cit. supra* note 58, at 23.

[70] "The standard of training for probation work should be graduation from an *accredited* graduate school of social work." CHILDREN'S BUREAU, PUB. No. 346, *op. cit. supra* note 7, at 86. In Mississippi selection can be made only from the eligible list furnished by the State Merit System. MISS. CODE ANN. § 7185-21 (1942).

he makes the investigation needed by the judge to determine the treatment to be given the child. Second, he supervises the children who are allowed to stay in the community.[71] But more than one half the counties of the United States have no probation service for juvenile delinquents.[72]

There are some highly recommended, yet not generally accepted, features to be considered. "The provision in the Model Act for true indeterminate control was one of the most crucial measures with which to protect society and rehabilitate the offender."[73] It has not been adopted in any of the acts following the model. The reasoning of legislators probably was that it would amount to perpetual control and violate the constitutional prohibition against cruel and unusual punishment. Yet the drafters of the act deplored punishment as a way to deal with juvenile offenders and refused to use it.[74]

The next recommendation to consider is that of "probation without a verdict,"[75] otherwise known as "voluntary probationary supervision without trial or conviction."[76] This plan was instituted in the federal courts in 1946, and the procedure is as follows: first, the probation officer makes a pre-prosecution investigation, study, and written report of the background of the juvenile offender and his possible culpability. If the United States Attorney decides not to prosecute, he may then request the probation officer to exercise disciplinary supervision for whatever length of time he designates. The probation officer prepares progress reports during the probation, and at the end of the time files a full report and recommendation. If the report is favorable, the case is not entertained; otherwise, official action is taken.[77] The virtue of this plan is that the offender is put under supervision so that he feels the weight of the court's sentence without injuring his reputation or character for the future.

> "For practical purposes, probation under suspended sentence after a verdict of guilty requires exactly the same conduct during the probation period as probation without a verdict. The idea of giving a probationer the right, if he completes his probation successfully, to wipe out the criminal stain has much merit. By such a device he is enabled and given an incentive by his own efforts to clear his record completely."[78]

Another recommendation is that the jurisdiction of the juvenile court be enlarged to include cases other than those concerning delinquency and neglect.[79] There are two reasons for such a suggestion: (1) the total welfare of the child is best served when everything concerning the child is considered by the specialized court; (2) some juvenile courts have so few cases that enlarged jurisdiction is essential to justify enough

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71 CHILDREN'S BUREAU, PUB. NO. 341, *op. cit. supra* note 58, at 25, 26.
72 *Ibid.*
73 *Supra* note 57, at 686.
74 *Id.* at 687.
75 Miles, *supra* note 23, at 729.
76 Meyer, *supra* note 46, at 478.
77 *Id.* at 479.
78 Miles, *supra* note 23.
79 CHILDREN'S BUREAU, PUB. NO. 346, *op. cit. supra* note 7, at 35.

funds to provide qualified workers in these specialized courts.[80] In Arkansas a constitutional amendment has been recommended to establish the right of the General Assembly to create family courts at places and with the jurisdiction deemed proper.[81] The Standard Juvenile Court Act recommends enlarging jurisdiction to include custody or guardianship, adoption of minors and termination of parental rights, consent to marriage of children where consent is required by law, prescribing of treatment for the mentally defective, adult contribution to child delinquency, divorce cases, probate matters, and trial of members of a family for crimes committed against another member of the family.[82]

The Mississippi Act in Operation

Even though Mississippi does not have the problems of great urban areas, its citizens should realize the importance of a successful youth court system. The juvenile delinquency rate is increasing in alarming proportions.[83] By 1960 Mississippi will have at least 500,000 children between ten and seventeen years of age. By 1970 they will be adult citizens accepting responsibility.[84] In 1953 there were 1,522 reported cases which came before the youth courts of Mississippi;[85] in 1954, there were 2,339 reported, 1,196 of which were official (petition filed). "The increases by year, in the number of cases before the Youth Courts in Mississippi, are partially due to increases in the number of counties reporting on Youth Court cases each year."[86] The percentage of children appearing in the youth courts more than once has decreased from four per cent in 1953[87] to two per cent in 1954.[88]

In actual practice, in 1954 thirty-eight per cent of all neglect cases and fifty-five per cent of the delinquency cases were unofficial—*i.e.*, an informal adjustment was made for the best interest of the child.[89] In official cases Mississippi judges have followed the philosophy of reformation instead of retribution. First offenders are frequently only counselled,[90] or put on probation in the custody and under the close supervision of the youth counsellor who visits the offender frequently and makes progress reports on his rehabilitation.[91] Another method is to take the case under advisement leaving the child in the custody of a relative so that a more thorough social study of the child may be made. At the end of the period of investigation, a further hearing results, at which time a final decision is made.[92] In cases of delinquents under

[80]Another way of solving the problem presented by (2) is to create a state wide children's court operated by districts. That would insure the same quality of judges and treatment to all. Maxted, *supra* note 17, at 28.

[81]*Id.* at 29.

[82]*Id.* at 27.

[83]Committee on Social Legislation, Mississippi Economic Council, Let's Talk About Children 5 (1953).

[84]*Id.* at 3.

[85]State Dep't of Public Welfare, Youth Court Statistics 4 (1953).

[86]State Dep't of Public Welfare, Youth Court Statistics 3-5 (1954).

[87]State Dep't of Public Welfare, Youth Court Statistics 14 (1953).

[88]State Dep't of Public Welfare, Youth Court Statistics 18 (1954).

[89]*Id.* at 5.

[90]Letter from Judge Zelma W. Price, July 23, 1955.

[91]Letter from Judge Lunsford Casey, July 2, 1955.

[92]Letter from Judge Charles A. Pollard, June 22, 1955.

ten years of age, disposition is given as if they were adjudged neglected.[93]

There has been some dispute as to the constitutionality of the Youth Court Act of 1946.[94] The constitutionality of the 1940 act was upheld[95] but in that act the circuit court had jurisdiction over the delinquent and could transfer him to the juvenile court in its discretion. In the present statute the circuit court has no jurisdiction over the child prior to action by the youth court. The contention is that this provision contravenes the Mississippi Constitution[96] in that it places criminal jurisdiction in a court in which such jurisdiction is not vested by the constitution. The answer is found in sections eight and nine of the 1946 act[97] where the proceeding is described as civil, not criminal. The adjudication recites only that the child is delinquent, and the adjudication is not deemed a conviction.

The vigorous dissent in *Wheeler v. Shoemake*,[98] based on the case of *Montross v. State*,[99] is very convincing. The *Montross* case involved the constitutionality of legislation conferring exclusive jurisdiction upon the city court of Biloxi to try certain violations of state laws. The legislation was held unconstitutional on the ground that the Mississippi Constitution placed such jurisdiction in the circuit court, and the legislature was without power to deprive it of such jurisdiction by conferring it exclusively upon another court. The *Wheeler* dissent argues that the 1946 act violates the "wisdom of the ages" which dictates that a child of seven may be capable of harboring criminal intent. However, the dissenting justices seem to have failed to consider the "wisdom of modern philosophy" which teaches that adult treatment of children leads to, instead of curbing, juvenile lawlessness.

Even though the 1946 act has been upheld by the supreme court, it contains certain peculiarities which should be clarified. In section thirteen[100] a "parent, guardian, or any other person" contributing to the delinquency or neglect of a child is declared guilty of a misdemeanor and maximum punishment is set. However, the proviso in the section states that only a "father, mother, or guardian" has a right to trial by jury. Why is there this classification relating to trials by jury?[101] Even though there is a need for a speedy trial, the same result could be had by allowing the action to be brought in justice of the peace or county court as in other misdemeanor cases against adults.

Even if all adult offenders could have a trial by jury, in those coun-

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93STATE DEP'T OF PUBLIC WELFARE, YOUTH COURT STATISTICS 12 (1954).
94Wheeler v. Shoemake, 213 Miss. 374, 57 So.2d 267 (1952).
95See note 29 *supra*.
96MISS. CONST. art. VI, § 156.
97MISS. CODE ANN. §§ 7185-08, 7185-09 (1942).
98213 Miss. 374, 57 So.2d 267 (1952).
9961 Miss. 429 (1883).
100MISS. CODE ANN. § 7185-13 (1942).
101"First, the Youth Court has no set terms, but is in session continuously in order that proceedings may be speedily had where the welfare of a child is at stake. Second, the Youth Court is not a court known to common law which the Constitution has reference to when stating that trials by jury shall be preserved. Third, the Legislature may in misdemeanor cases provide for trial without a jury." Letter from Judge Lunsford Casey, July 2, 1955.

ties where the chancery court is the youth court there is still a constitutional question of the chancery court's having criminal jurisdiction.[102] In the case of a child there is no problem because the power to adjudge a child delinquent is not within criminal jurisdiction. Considerations of criminal jurisdiction intervene when power to convict an adult of a misdemeanor is given. Section twelve[103] of the act states that an adult contributing to the delinquency or neglect of a child may be "required by the court to do or omit to do any act or acts which the judge may deem reasonable and necessary for the welfare of the child." In requiring adult conduct to conform to its order, the court is seeking to reform the environment for the benefit of the child. Section thirteen provides punishment of an adult for a crime. If there is a conviction under section thirteen in a county where there is a county court, the appeal must be to the chancery court, not the circuit court. Whether the jurisdiction is original or appellate, the court of equity is dealing with a criminal case. Perhaps the appeals section[104] could be amended to allow appeals in cases within section thirteen to be taken to the circuit court instead of the chancery court "and either one of two methods pursued there. First, permit the case to be tried de novo before a jury, and regardless of the proceedings below, or permit the case to be heard on the record, and if reversed, remanded to the circuit court docket to be tried by a jury."[105]

The Needs of the Present Mississippi Act

Even though Mississippi's act is relatively good, practice has revealed some weaknesses in it. Certain amendments should be made in the present law. In counties where there is a county court, the judge should be allowed to appoint the youth counsellor without the approval of the Board of Supervisors. In counties large enough to justify a county court, there is obviously a need for a youth counsellor without any further determination from anyone. In cases where the County Department of Public Welfare is to furnish the youth counsellor, the department should furnish a *full time* worker to report directly to the court, and whose sole responsibility is to work on cases assigned through the youth court.[106] The merit system requirements should be stronger and the pay scale higher, with automobile or transportation expense included.[107]

There should also be a limited emergency fund to be used in the court's discretion for unforeseeable expenses incurred in protecting the interest of the particular child before the court.[108] The act should be amended to make it possible for the Board of Supervisors to supply some

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[102] *Ibid.*

[103] Miss. Code Ann. § 7185-12 (1942).

[104] *Id.* § 7185-24.

[105] Letter from Judge Lunsford Casey, July 2, 1955.

[106] "In those states where the welfare department already provides services to the local courts, too often it is the secondary function of an already overloaded categorical assistance worker. If a separate functional division could be established to specialize in court work on a regional basis, the benefits of centralized administration could accrue and a more adequate and better organized effort might be expected." Ward, *The Federal Probation Officer and the Local Juvenile Court*, 16 Fed. Prob. 16 (June 1952).

[107] Letter from Judge Lunsford Casey, July 2, 1955.

[108] *E.g.*, out of state run away children sent back to their home state. Letter from Judge Lunsford Casey, July 2, 1955.

secretarial assistance. There is a need for detention homes to insure that a child awaiting court action shall not be placed in a jail. There is an even greater need to provide a training school for delinquent negro girls and to enlarge the one now provided for negro boys.[109] More safeguards should be erected to insure that children under ten or with physical defects shall not be placed in the training school.

Legislation is not the complete answer to the needs of any group of children, but "a legal framework is a necessary basis for the implementation, the administration, the enforcement, and the fulfilment of the concept . . . that the State recognizes its duty . . . to protect its children who need its protection from a harmful environment, neglect, dependency, and harmful habits of the children; and, to provide the resources possible at this time to afford the care, protection and rehabilitation indicated for the physical, mental, emotional and moral well-being of its children."[110]

Greater use of the act should be made by the courts. Progress is being made, for in 1949 thirty-five counties reported the youth court inactive.[111] In 1954 only eighteen courts were reported inactive.[112] "The sympathetic attitude of the members of the bar in helping to interpret this law to the public will do much to assure its successful administration."[113] The attitude of the public, in the final analysis, will be the determining factor in the complete effectiveness of the act. "When the majority of the citizenry are made to realize the need for it every county in the state should and will have a separate youth court for children's cases. In a county not able to provide such a court by itself, more than one county could combine their courts."[114] May that judge's dream come true and may Mississippi continue to go forward "for the best interest of the child."[115]

Mary Elizabeth Bickerstaff

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[109]Letters from Judge Zelma W. Price, July 23, 1955, and Judge Lunsford Casey, July 2, 1955.

[110]Bass, *Function of the Children's Code Commission*, 17 Miss. L.J. 444, 445 (1946).

[111]Committee on Social Legislation, Mississippi Economic Council, *op. cit. supra* note 83, at 7.

[112]State Dep't of Public Welfare, Youth Court Statistics ii (1954).

[113]Haralson, *Mississippi's New Youth Court Act*, 17 Miss. L.J. 453 (1946).

[114]Letter from Judge Zelma W. Price, July 23, 1955.

[115]Miss. Code Ann. § 7185-09 (1942).

RECENT DECISIONS

CONSTITUTIONAL LAW—POSSIBILITY OF REVERTER OPERATIVE UPON USE BY NON-WHITES

In 1929 Barringer conveyed as a gift certain land to the Charlotte Park and Recreation Commission, a public body corporate.[1] Revolution Park was formed by the commission out of the land involved in the several conveyances. The Barringer deed provided that the land granted by him should revert if *any* of the land of the several conveyances should be used by non-whites.[2] In 1951 a group of Negroes petitioned the commission for the use of the park golf course in accord with alleged constitutional rights. Thereupon the commission instituted the present action for declaratory judgment against the grantors, joining as defendants the Negroes who filed the petition. Only the Negroes appealed from the holding of the lower court. HELD: The Barringer deed created a determinable fee with a possibility of reverter which would operate if Negroes used the golf course; this *operation* is not by any judicial enforcement of the courts of North Carolina; therefore *Shelley v. Kraemer*[3] does not apply. *Charlotte Park and Recreation Comm'n v. Barringer*, 88 S.E.2d 144 (N.C. 1955).

In *Shelley v. Kraemer*[4] the Supreme Court held that racially restrictive covenants could not be enforced by a state court without a violation of the equal protection clause of the fourteenth amendment.[5] The doctrine of the *Shelley* case has been extended by *Barrows v. Jackson*,[6] where it was held that an award of damages for breach of a racially restrictive covenant denied equal protection of the laws, in that it *tended* to cause prospective grantors to demand a higher purchase price of prospective non-Caucasian grantees, in order to allow for damages. The unusual case of *Rice v. Sioux City Memorial Park Cemetery*[7] is also somewhat in point. Prior to *Shelley v. Kraemer*, covenants and agreements between landowners restricting use or ownership, or both, in racial terms were held constitutional.[8] Likewise, covenants

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[1]On the same date other individuals and the Abbot Realty Company and the city of Charlotte also conveyed land as a gift to the commission.

[2]The deed from the other individuals also contained such a provision, but the commission had subsequently acquired their rights of reversion by quitclaim deed. The deed from the realty company did not contain such a provision, as the court in the instant case interpreted that deed. The city's deed contained the provision, but appellants were not allowed to raise the constitutional question on appeal, as the lower court held that provision unconstitutional.

[3]334 U.S. 1 (1947).

[4]It was brought out that as long as there was voluntary adherence to such agreements they were valid, but that judicial enforcement constituted state action so as to bring the fourteenth amendment into play.

[5]"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV, § 2.

[6]An award of damages for breach of a racially restrictive covenant is state action depriving non-Caucasians, unidentified but identifiable, of equal protection of the laws. The rights of this unidentified class can be vindicated by one of the covenantors being sued for damages by his co-covenantors. 346 U.S. 249 (1952).

[7]A Caucasian widow purchased a cemetery lot, and the contract of sale stipulated that burial privileges were limited to members of the Caucasian race. It was held that there was no action for breach of contract upon refusal by the cemetery to bury her Indian husband. 60 N.W.2d 110 (Iowa 1953), *aff'd per curiam*, 348 U.S. 880 (1954).

[8]Russell v. Wallace, 30 F.2d 981 (D.C. Cir. 1929), *cert. denied*, 279 U.S. 871 (1928); Corrigan v. Buckley, 299 Fed. 899 (D.C. Cir. 1924), *appeal dismissed*, 271 U.S. 323 (1925); Steward v. Cronan, 105 Colo. 393, 98 P.2d 999 (1940).

in deeds[9] and conditions subsequent[10] were previously upheld, but both must unquestionably fail on the strength of the *Shelley* case. About twenty jurisdictions recognize the determinable fee (fee on special limitation).[11] There is no recorded case where this type of estate provided against use or ownership by a group defined in racial terms, but an article appeared in the *North Carolina Law Review*,[12] entertaining the possibility of avoiding *Shelley v. Kraemer* in this manner.[13]

The position of the North Carolina court is that because of the nature of the possibility of reverter, that is, its automatic aspects, there is no state action involved in its *operation*. This *may* be true, but how is it that there is not state action in the very decision of the court? What is significant under *Shelley v. Kraemer* is that a decision by a state court, even though the action involves only individuals, is state action. There is, then, state action in this case. Thus, the court should have proceeded to the question whether there is a constitutional right in non-whites to use a municipal park. A negative answer would have (erroneously)[14] disposed of the question. An affirmative answer would have demanded that the court decide whether *its* upholding the possibility of reverter would deny this constitutional right. The correct (what the United States Supreme Court would hold) answer would probably be along the lines of *Barrows v. Jackson*, ending in the conclusion that the state court's upholding the possibility of reverter denies equal protection of the laws, in that it causes the park commission to continue to exclude non-Caucasians in order not to lose its land. However, there is the possibility that the Supreme Court might not choose to carry the "tendency" concept this far, and would hold that although there is a constitutional right in non-Caucasians to use the municipal park, there is no infringement of this right in the state court's upholding the possibility of reverter.[15] The reason would be that the state[16] must permit non-Caucasians to use the park, as a result of which the land will revert to the grantor; the right to use the park is vindicated, and the park ceases to be; there is no constitutional right that the park continue to be used as a park. The first of these two possible decisions would make all such provisions unenforceable; the second would make future ones impossible as a practical matter.

There is the broader implication in the instant case that a possibility of reverter will always avoid *Shelley v. Kraemer* because of its automatic operation without the action of a court. This is clearly erroneous under *Shelley*. For once the state judicial system is invoked to enforce the provision or declare as to its validity, there is state action.

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[9]Edwards v. West Woodridge Theater Co., 55 F.2d 524 (D.C. Cir. 1931); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915); Ridgway v. Cockburn, 296 N.Y. Supp. 936 (Sup. Ct. 1937).

[10]Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P.2d 720 (1944); Los Angeles Invest. Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919).

[11]"In the case of a special limitation, the estate terminates by force of the limitation alone, while, in the case of a condition, the estate does not terminate upon its breach, unless an entry or claim is made by the person entitled to the advantage of the condition." 1 TIFFANY, REAL PROPERTY, § 188 (3d ed. 1939).

[12]Note, 27 N.C.L. REV. 224 (1949).

[13]The writer arrived at the opposite conclusion to that of the court in the instant case.

[14]Mayor of Baltimore City v. Dawson, 76 S. Ct. 133 (1955); Holmes v. Atlanta, 76 S. Ct. 141 (1955).

[15]In this line of reasoning, the Supreme Court either would refuse to entertain the possibility of the park commission's tendency to continue to exclude, or would consider the possibility too remote.

[16]The state is involved here in the first instance—aside from the decision of the state court—through the city park situation.

Thus, in a suit involving individuals without park, school, or like complications, the issue would again reduce to whether the decision denied constitutional rights. On the basis of *Barrows v. Jackson* there seems to be no chance that the particular plaintiff-defendant combination would result in inability to *raise* the constitutional question. Nor would there be an alternative answer to the question whether the decision actually denied constitutional rights as there was under the particular facts of the instant case. For land may cease to be used as a park, but it cannot cease to be used as land; and there would be no other avenue open to reach the question, as the only state action would be that of the court.

Stanley Cook

LABOR LAW—COLLECTIVE BARGAINING VERSUS RIGHT TO WORK STATUTE

Piegts operated a food store and meat market. All his business was intrastate. He had in his employ two meat cutters, both of whom were members of the meat cutters union. The union presented the employer with an agreement naming the union sole bargaining agent for all employees in the meat department. The employer refused to sign the agreement, contending that it violated Louisiana's Right to Work Statute.[1] The two meat cutters struck and began peaceful picketing, whereupon Piegts hired a nonunion butcher, obtained a temporary restraining order enjoining the picketing and sought a temporary and permanent injunction. The lower court dissolved its temporary restraining order and refused to grant a preliminary injunction. HELD:[2] Making a union the sole collective bargaining agent for all employees, whether union members or not, abridges the rights of nonunion employees and therefore violates the Louisiana Right to Work Statute. *Piegts v. Local 437, Amalgamated Meat Cutters, AFL*, 228 La. 131, 81 So.2d 835 (1955).

Eighteen states[3] have "right to work" statutes, which are generally used to control union security arrangements. Agreements sought to be controlled include closed shop, union shop and maintenance of membership contracts.[4] The state "right to work" statutes are permitted to affect interstate commerce only to the extent sanctioned by section 14 (b)[5] of the National Labor Relations Act, as amended.[6] That the NLRA encourages collective bargaining is spelled out in sections one and seven[7] of

[1] LA. REV. STAT. ANN. §§ 23: 881-888 (Supp. 1954).

[2] Two justices dissented.

[3] Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia.

[4] Murphy, *The "Right to Work" Statute*, 26 MISS. L.J. 39 (1954).

[5] "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 28 U.S.C. § 164 (Supp. 1955).

[6] Lincoln Fed. Union v. Northwestern Iron and Metal Co., 149 Neb. 627, 31 N.W.2d 477, *aff'd*, 335 U.S. 525 (1948); State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947); Finney v. Hawkins, 189 Va. 878, 54 S.E.2d 872 (1949).

[7] 29 U.S.C. § 151 (Supp. 1955); 29 U.S.C. § 158 (Supp. 1955). See also section 210 (a) of Taft-Hartley, 29 U.S.C. § 171 (a) (Supp. 1955): "Sound and stable industrial peace and the advancement of the general welfare, health, and safety of the nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the process of conference and collective bargaining between employers and the representatives of their employees."

the act, which make it a duty of the employer to bargain collectively;[8] and section nine[9] clearly provides that a union, if selected, is to be the exclusive bargaining agent. There is no indication that "right to work" statutes were intended to destroy collective bargaining. Seven of the statutes, including Louisiana's, have specific provisions protecting collective bargaining.[10] The Louisiana statute states: "Nothing in this act shall be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."[11] Ironically, this was the very section relied on by the majority in holding that the nonunion workers' power to contract freely would be impaired by enforcing a collective bargaining agreement designating the union sole bargaining agent. The court seems to have relied on the "liberty of contract" doctrine which has been discredited by the federal courts.[12]

The court in the noted case was concerned with intrastate activities only. However, under section 14(b) of the NLRA, "right to work" statutes apply to interstate as well as intrastate activities.[13] The provisions of a "right to work" statute should be given the same meaning whether applied to intrastate or interstate activities; otherwise the application of the statute could be found discriminatory and invalid under equal protection principles.[14] Since a "right to work" statute cannot be so applied to interstate commerce without conflicting with section nine of the NLRA, the suppression of collective bargaining in intrastate cases is of doubtful constitutionality. The decision reached in the noted case is the only instance the writer has found of an application of a "right to work" statute to restrain picketing, the object of which is recognition of a union as exclusive bargaining agent. The court has evidently misapplied the section of Louisiana's Right to Work Statute providing for collective bargaining in relying upon this very section to destroy collective bargaining. Surely such a result was never intended by the state in passing its Right to Work Statute.

Richard H. Carlisle

Municipal Law—Ordinance Barring Uninvited Transient Vendors From City Residential Areas

Day, operator of a photography studio, sought an injunction against the Chief of Police of the City of Gulfport to restrain the enforcement of a city ordinance declaring the practice of going in and upon private residences by transient vendors to be a nuisance and punishable as a misdemeanor.[1] Complainant, whose employees had

[8]61 Stat. 136 (1947), 29 U.S.C. § 157 (Supp. 1955), discussed in 33 B.U.L. Rev. 81 (1953).

[9]29 U.S.C. § 159 (Supp. 1955).

[10]Louisiana, North Carolina, North Dakota, South Dakota, Texas, Utah, Virginia.

[11]La. Rev. Stat. Ann. § 23: 881 (Supp. 1954).

[12]Labor Board v. Jones & Laughlin, 301 U.S. 1 (1941), and Phelps Dodge Corporation v. N.L.R.B., 313 U.S. 177 (1941), refute this argument.

[13]Lincoln Federal Union v. Northwestern Iron and Metal Co., 149 Neb. 627, 31 N.W.2d 477, *aff'd*, 335 U.S. 525 (1948).

[14]See, *e.g.*, Liggett v. Baldridge, 278 U.S. 105 (1928); Southern Ry. v. Green, 216 U.S. 400 (1910).

[1]"Section 1: That the practice of going in and upon private residences in the City of Gulfport, Mississippi, by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise not having been requested or invited so to do by the owner, owners, occupant or occupants of said private residence for the purpose of

been arrested by city police while soliciting orders for photographs in commercial and residential areas of the city, charged that the ordinance unreasonably prohibited the doing of a lawful business. From a decree dismissing the bill of complaint, complainant appealed. HELD: The ordinance is valid as it applies to soliciting in private residences.[2] *Day v. Klein*, 82 So.2d 831 (Miss. 1955).

Since 1931 "Green River" ordinances[3] have been adopted by municipalities as a means of regulating house-to-house canvassing by transient vendors. The typical "Green River" ordinance has been upheld by the United States Supreme Court against charges that it violates the due process clause of the fourteenth amendment and the commerce clause, and that it abridges freedom of speech and press.[4] Similar ordinances have been held invalid when applied to restrain distribution of religious pamphlets.[5] Although "Green River" ordinances have been held not violative of any federal constitutional provision, the majority of state courts which have considered such ordinances have held them invalid.[6] With the exceptions of Oklahoma[7] and

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soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same, is declared to be a nuisance and punishable as such nuisance as a misdemeanor." Section 2 is substantially the same except that it applies to "private property and buildings other than residences." GULFPORT ORDINANCE No. 781 (1951).

[2]Although this Casenote will discuss only section 1 of the ordinance, it should be noted that section 2, which forbade the practice of going in and upon private property and buildings other than residences, was held invalid as it ignored the plainly implied invitation extended by businessmen. 82 So.2d at 836.

[3]As Green River, Wyoming, was the first municipality to pass an ordinance of this type that resulted in litigation, similar ordinances are commonly called "Green River" ordinances. See Town of Green River v. Fuller Brush Co., 65 F.2d 112, 88 A.L.R. 177 (10th Cir. 1933), for original ordinance.

[4]Breard v. City of Alexandria, 341 U.S. 622 (1951).

[5]Donley v. Colorado Springs, 40 F. Supp. 15 (S.D. Colo. 1941). In Zimmerman v. London, 38 F. Supp. 582 (S.D. Ohio 1941), the ordinance was held invalid as applied to restrain distribution of pamphlets by Jehovah's Witnesses, although the court refused to hold it invalid on its face for all purposes. *But see* Marsh v. Alabama, 326 U.S. 501 (1946), and Martin v. City of Struthers, 319 U.S. 141 (1944). The Struthers case was distinguished in Breard v. Alexandria, *supra* note 4, on the ground that in the Struthers case no "element of the commercial entered into this free solicitation and the opinion was narrowly limited to the precise fact of the free distribution of an invitation to religious services."

[6]States holding the ordinance invalid: Arkansas, Wilkins v. Harrison, 218 Ark. 316, 236 S.W.2d 82 (1951); Florida, Prior v. White, 132 Fla. 1, 180 So. 347 (1938); Georgia, De Berry v. La Grange, 62 Ga. App. 74, 8 S.E.2d 146 (1940); Iowa, Osceola v. Blair, 231 Iowa 770, 2 N.W.2d 83 (1942); Kentucky, Mt. Sterling v. Donaldson Baking Co., 287 Ky. 781, 155 S.W.2d 237 (1941); Maryland, Jewel Tea Co. v. Bel Air, 172 Md. 536, 192 Atl. 417 (1937); Nebraska, Jewel Tea Co. v. Geneva, 137 Neb. 768, 291 N.W. 664 (1940); New Jersey, New Jersey Good Humor, Inc. v. Bradley Beach, 124 N.J.L. 162, 11 A.2d 113 (1940); Oklahoma, McAlester v. Grand Union Tea Co., 186 Okla. 487, 98 P.2d 924 (1940); South Carolina, Orangeburg v. Farmer, 181 S.C. 143, 186 S.E. 783 (1936); Texas, *Ex parte* Luehr, 266 S.W.2d 375 (Tex. Crim. 1954); Virginia, White v. Culpeper, 172 Va. 630, 1 S.E.2d 269 (1939).

States holding the ordinance valid: Colorado, McCormick v. Montrose, 105 Colo. 493, 99 P.2d 969 (1940); Idaho, Rowe v. Pocatello, 70 Idaho 343, 218 P.2d 695 (1950); Alexander v. Breard, 217 La. 820, 47 So.2d 553 (1950); New Mexico, Green v. Gallup, 46 N.M. 71, 129 P.2d 619 (1941); New York, People v. Bohnke, 287 N.Y. 154, 38 N.E.2d 478 (1941); Oregon, Phillips v. Bend, 191 Ore. 143, 234 P.2d 572 (1951); Wyoming, Town of Green River v. Martin, 254 P.2d 198 (Wyo. 1953).

[7]In McAlester v. Grand Union Tea Co., *supra* note 6, the court held that the ordinance was invalid on the ground that the city was without authority to declare that which at most was simply a private nuisance to be a public nuisance.

Virginia,[8] these courts have based their decisions on the ground that such a restriction constitutes an unreasonable or arbitrary exercise of the police power.[9] Yet the trend in recent decisions is toward recognizing the validity of the "Green River" ordinance.[10]

It appears that the conflicting decisions have resulted from different appraisals of the interests involved—the interest of the solicitor in conducting a lawful business, and the interest of the community in protecting its citizens. An occasional visit by a solicitor or peddler would certainly not constitute sufficient grounds for such an ordinance, but where the visits are multiplied they may easily become a nuisance and, as such, can be regulated by the municipality.[11] As pointed out by the court in the case at bar, the ordinance is clearly regulatory and not prohibitory.[12] "It does not prohibit the calling upon persons in private residences, but merely requires that such calls be made after invitation of the householder. . . . Other usual methods of solicitation, such as telephone, radio, television, periodicals, the mail, are open."[13] No court should go as far as the federal court which judicially noticed that transient vendors constitute a nuisance;[14] but where the governing body of the city has investigated and found that a nuisance exists, and no contradiction of such finding appears, it seems that the ordinance is within the municipal authority and should be upheld.

Jess B. Rogers

STREAM POLLUTION—NUISANCE AS BASIS FOR LIABILITY

Defendant operated an oil refinery, the effluent from which drained into a creek which flowed through plaintiff's land, about sixty to eighty acres of which were below the point at which the effluent entered the creek and were subject to the creek's overflow. Plaintiff sought to recover for damage to his land caused by the overflow of the creek which he claimed to have been polluted by the effluent from the defendant's refinery during the period from August 22, 1947, to August 22, 1953. Plaintiff and others had given notice of the pollution to defendant prior to suit and pollution had continued after notice. The facts in this case were practically identical to those in the two cases of *Southland Co. v. Aaron*[1] involving the land immediately north of that here involved. The *Aaron* cases decided that liability for pollution of a stream was based on nuisance rather than negligence and that after notice of pollution a con-

[8]In White v. Culpeper, 172 Va. 630, 1 S.E.2d 269 (1939), the court declared that the charter power of the municipality to abate "anything which in the opinion of a majority of the whole council shall be a nuisance" was limited to a public nuisance, while the conduct proscribed by the ordinance was, at most, a private nuisance, which is not punishable as a crime.

[9]It should be noted that in the instant case the municipality had specific authority "to adopt reasonable ordinances for the regulation of . . . transient vendors . . . [and] traveling photographers. . . ." MISS. CODE ANN. § 3374-131 (1942).

[10]Cases cited note 6 *supra*.

[11]The applicable sources of municipal power in Mississippi are: "The municipal governing authorities shall have the power to make regulations to . . . prevent, remove, and abate nuisances. . . ." MISS. CODE ANN. § 3374-116 (1942); "The governing authorities of municipalities shall have power to make all needful police regulations necessary for the preservation of good order and peace of the municipality and to prevent . . . interference with public or private property. . . ." MISS. CODE ANN. § 3374-124 (1942).

[12]82 So.2d at 835.

[13]Breard v. City of Alexandria, 341 U.S. 622 (1951).

[14]Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933).

[1]72 So.2d 161 (Miss. 1954); 80 So.2d 823 (Miss. 1955).

tinuance of it would render the defendant liable for punitive damages. HELD: The law of this case being governed by the *Aaron* cases, punitive damages were rightfully awarded. *Southland Co. v. McDonald*, 82 So.2d 448 (Miss. 1955).

The older Mississippi cases dealing with stream pollution were not based expressly on nuisance, but on the right to the water in its accustomed purity.[2] The liability of an oil producer or refiner for the injury resulting from his pollution of a stream is generally recognized,[3] but the basis of this liability is not uniform. Kansas,[4] Louisiana,[5] Oklahoma,[6] and Texas[7] have statutes which impose liability within their scope. These same states also recognize negligence as a basis for liability in proper cases.[8]

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[2]Masonite Corp. v. Steede, 198 Miss. 530, 21 So.2d 463 (1945); American Sand & Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938); Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292 (1933); Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. 26 (1892).

[3]See Green v. Pelican Natural Gas Co., 163 So. 431 (La. App. 1935); Annot., 19 A.L.R.2d 1025 (1951).

[4]"It shall be unlawful for any person having possession or control of any well drilled or being drilled for oil and gas . . . to permit salt water, oil or refuse from any such well to escape upon the ground and flow away from the immediate vicinity of such well, and it shall be the duty of any such person to keep such salt water, oil or refuse safely confined . . . so as to prevent the escape thereof; provided, however, that this act shall not be construed to apply to the escape of salt water, oil or refuse because of circumstances beyond the control of the person in possession or control of such well and under circumstances which could not have been reasonably anticipated and guarded against." KAN. GEN. STAT. § 55-121 (1949).

[5]"[N]o person shall knowingly and willfully empty or drain into or permit to be drained from any pumps, reservoir, wells or oil fields into any natural stream or drain from which water is taken for irrigation purposes any oil, salt water or other noxious or poisonous substances or gases which would render the water unfit for irrigation purposes or would destroy the fish therein, except during an open season hereby established between October 1st and December 31st inclusive of each year. . . .

"The prohibitions of this chapter, however, shall not prevent: 1. The discharge or drainage of salt water, brine and chemical salts from industrial, oil or mining operations into those streams and drains having water which has a normal salt content of more than 110 grains per gallon. . . . 2. The discharge or drainage of salt water, brine, chemical salts, chemicals, solids or any other substances from industry, oil or mining operations into any stream having its source outside the State of Louisiana or into any tributary thereof." LA. REV. STAT. ANN. § 38:216 (Supp. 1954).

[6]"No inflammable product from any oil or gas well shall be permitted to run into any tank, pool, or stream used for watering stock; and all waste of oil and refuse from tanks or wells shall be drained into proper receptacles. . . . Salt water shall not be allowed to flow over the surface of the land." OKLA. STAT. ANN. tit. 52, § 296 (1951). *But see* Gulf Pipe Line Co. v. Alred, 182 Okla. 400, 77 P.2d 1155 (1938), and Johnson Oil & Refining Co. v. Carnes, 174 Okla. 599, 51 P.2d 811 (1935), where virtually the same statute was held inapplicable to refineries and pipelines.

[7]"Art. 698a Vernon's Ann. Penal Code, Section 1 provides that when a violation of said Act is charged proof must be made that the oil or waste 'covered an area of such water in excess of ten thousand (10,000) square feet or was on the surface of a river, stream, bayou or channel of this State for a distance in excess of three hundred (300) feet.' Section 2 of said statute provides, in substance, that it shall not be a violation thereof to discharge salt water into a stream unless such act 'produces or contributes to a salinity in excess of two thousand parts of salt in one million parts of water. . . .' " Helton v. Luse & Fosdick Drilling Co., 147 S.W.2d 831 (Tex. Civ. App. 1941).

[8]Frazer v. Cities Service Oil Co., 159 Kan. 655, 157 P.2d 822 (1945); Seglem v. Skelly Oil Co., 145 Kan. 216, 65 P.2d 553 (1937); Williams v. Pelican Natural Gas Co., 187 La. 462, 175 So. 28 (1937); Whiter v. Edgerly Petroleum Co., 4 La. App. 20 (1925). See Phillips Petroleum Co. v. Hardee, 189 F.2d 205 (5th Cir. 1951); Jordan v. Peek, 268 P.2d 242 (Okla. 1954); Phillips Petroleum Co. v. Sheel, 208 Okla. 416, 256 P.2d

Kentucky also recognizes the negligence basis,[9] as does Illinois in cases where the plaintiff is the lessor of the defendant.[10] States other than Mississippi recognizing nuisance as the basis of liability for stream pollution by oil and gas producers and refiners are Arkansas,[11] Illinois,[12] Indiana,[13] Kansas,[14] Missouri,[15] and Ohio.[16]

Of the three bases for liability, statutes, negligence, or nuisance, the most flexible seems to be nuisance. With nuisance as a basis there will be a weighing of the rights of the parties as to what constitutes a "reasonable" use of the stream,[17] thus allowing the forces of public policy and necessity to be brought into play so that the rights of the parties and those of the public may be reconciled. Under this theory several remedies are available. Actual damages may be awarded, including permanent damages.[18] Of course, nominal damages are proper to vindicate a right where there has been no actual damage. Also available in a proper case is the equitable remedy of the injunction.[19] As will be seen from the states above that use more than one of the theories, the fact that one is adopted does not preclude the use of another where the facts warrant. Thus while the nuisance theory should prove a very workable one, we may in the future see cases in this field based on the negligence theory or statutory control, especially in light of the growing number of states passing general water control measures.[20]

John A. Welsch, Jr.

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815 (1953); Rock Island Oil & Refining Co. v. Hutchinson, 208 Okla. 259, 255 P.2d 234 (1953); Gulf Oil Co. v. Miller, 198 Okla. 54, 175 P.2d 335 (1946); Sun Oil Co. v. Hoke, 197 Okla. 261, 169 P.2d 753 (1946); Pure Oil Co. v. Quarles, 183 Okla. 418, 82 P.2d 970 (1938); Magnolia Petroleum Co. v. Ford, 183 Okla. 14, 79 P.2d 588 (1938); Nash & Windfohr v. Edens, 109 S.W.2d 496 (Tex. Civ. App. 1937); Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936); Nash & Windfohr Oil Corp. v. Johnson, 81 S.W.2d 749 (Tex. Civ. App. 1935).

[9]B. & B. Oil Co. v. Townsend, 301 Ky. 667, 192 S.W.2d 953 (1946).

[10]Phoenix v. Graham, 349 Ill. App. 326, 110 N.E.2d 669 (1953), and cases cited therein.

[11]Spartan Drilling Co. v. Bull, 221 Ark. 168, 252 S.W.2d 408 (1952).

[12]Phoenix v. Graham, 349 Ill. App. 326, 110 N.E.2d 669 (1953). However, Illinois now has a statute empowering the Mining Board to regulate the disposal of oil well waste. ILL. ANN. STAT. tit. 104, § 69a (Supp. 1954).

[13]Tichenor v. Witherspoon, 87 Ind. App. 79, 158 N.E. 514 (1927).

[14]Berry v. Shell Petroleum Co., 140 Kan. 94, 33 P.2d 953 (1934).

[15]Divelbiss v. Phillips Petroleum Co., 272 S.W.2d 839 (Mo. App. 1954).

[16]Straight v. Hoover, 79 Ohio St. 263, 87 N.E. 174 (1909).

[17]Young v. Weaver, 202 Miss. 291, 32 So.2d 202 (1947); American Sand & Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938); Reber v. Illinois Cent. R.R., 161 Miss. 885, 138 So. 574 (1932); Commonwealth *ex rel.* Shumaker v. New York & Pa. Co., 378 Pa. 359, 106 A.2d 239 (1954); Panther Coal Co. v. Looney, 185 Va. 758, 40 S.E.2d 298 (1946).

[18]Shell Petroleum Corp. v. Kent, 187 Okla. 637, 105 P.2d 230 (1940); Argo Oil Co. v. Snouffer, 175 Okla. 382, 52 P.2d 803 (1935). See Bartlet v. Gasselli Chemical Co., 92 W. Va. 445, 115 S.E. 451 (1922); McHenry v. City of Parkersburg, 66 W. Va. 533, 66 S.E. 750 (1909).

[19]See Montgomery Limestone Co. v. Bearden, 256 Ala. 269, 54 So.2d 571 (1951); Clark v. Lindsay Light & Chemical Co., 341 Ill. App. 316, 93 N.E.2d 441 (1950).

[20]*E.g.*, OHIO REV. CODE § 6111.04 (1953): "No person shall cause pollution . . . of any waters of the state, or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state. Any such action is hereby declared to be a public nuisance, except in such cases where the water pollution control board has issued a valid and unexpired permit. . . .

This section does not apply to: A. Any industrial wastes or acid mine drainage until the board, after hearing, determines that practical means for the removal of the polluting properties of such wastes or drainage are known. . . ."

TORTS—LIABILITY OF NATURAL GAS DISTRIBUTORS

Defendant gas company was requested by the plaintiff, Goudelock, to connect the gas service line to piping within a house being constructed by a contractor for sale to the plaintiff. Plaintiff's purpose in having the gas connected was to provide heat for painters working inside the house. After installing the meter and connecting the service line, defendant gas company discovered that gas was escaping within the house and turned off the gas at the meter, in accordance with the gas code of the city of Clarksdale. The defendant gave no warning of the leak to the contractor or to the plaintiff. Thereafter, in violation of the code, an unknown person turned on the gas at the meter. Later, plaintiff was injured by a resulting explosion, and brought suit against the contractor and the gas company, but prior to the trial took a nonsuit as to the contractor. HELD: Judgment for plaintiff reversed. A distributor of natural gas is not liable for injuries caused by an explosion of gas when, upon receiving notice that gas is escaping in the premises of a patron, the company, as quickly as practicably possible, either shuts off the gas or remedies the defect. *Mississippi Valley Gas Co. v. Goudelock*, 79 So.2d 718 (Miss. 1955).

The degree of care which a gas company must exert in order to avoid liability has been described as ordinary care,[1] as due and reasonable care,[2] and as a high degree of care.[3] These terms are frequently said to mean no more than that care and diligence should vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted.[4] In Mississippi this idea has been expressed as follows: "Natural gas is an extraordinarily dangerous element, and those who are authorized to furnish it for use among the public are charged with a degree of care and skill commensurate with that danger. . . ."[5] A gas company must take every reasonable precaution suggested by experience and the known danger of the escape of gas.[6] Once the legal duty or standard of care has been established by the judge,[7] the jury ordinarily decides the *particular* standard of conduct.[8] An intervening act of a third party may break the

[1]Richmond Gas Co. v. Baker, 146 Ind. 600, 45 N.E. 1049, 36 L.R.A. 683 (1897); McWilliams v. Kentucky Heating Co., 166 Ky. 26, 179 S.W. 24, 1916A L.R.A. 1224 (1915); Louisville Gas Co. v. Guelat, 150 Ky. 583, 150 S.W. 656, 42 L.R.A. (N.S.) 703 (1912).

[2]Holly v. Boston Gas Light Co., 74 Mass. (8 Gray) 123, 69 Am. Dec. 233 (1857); Gould v. Winona Gas Co., 100 Minn. 258, 111 N.W. 254, 10 L.R.A. (N.S.) 889 (1907).

[3]Heh v. Consolidated Gas Co., 201 Pa. 443, 50 Atl. 994, 88 Am. St. Rep. 819 (1902).

[4]Holly v. Boston Gas Light Co., 74 Mass. (8 Gray) 123, 69 Am. Dec. 233 (1857).

[5]Mississippi Pub. Serv. Co. v. Cunningham, 189 Miss. 179, 195 So. 472 (1940); Mississippi Power & Light Co. v. McCormick, 175 Miss. 337, 166 So. 534 (1936). It should be pointed out that while the Mississippi Supreme Court expressed in these cases the idea of a standard of care commensurate with the danger of natural gas, the rigid rule of conduct actually applied by the court hardly seems to be consistent with that idea.

[6]Consolidated Gas. Co. v. Conner, 114 Md. 140, 78 Atl. 725, 32 L.R.A. (N.S.) 809 (1910); Consolidated Gas Co. v. Crocker, 82 Md. 113, 33 Atl. 423, 31 L.R.A. 785 (1895); Gould v. Winona Gas Co., 100 Minn. 258, 111 N.W. 254, 10 L.R.A. (N.S.) 889 (1907); Heh v. Consolidated Gas Co., 201 Pa. 443, 50 Atl. 994, 88 Am. St. Rep. 819 (1902); Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L.R.A. 759, 34 Am. St. Rep. 653 (1893); Canfield v. West Virginia Cent. Gas Co., 80 W. Va. 731, 93 S.E. 815, 1918A L.R.A. 808 (1917).

[7]Georgia Ry. & Elec. Co. v. Cole, 57 S.E. 1026 (Ga. 1907); Morril v. Morril, 104 N. J. L. 557, 142 Atl. 337, 60 A.L.R. 102 (1928).

[8]Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 34 S.W. 547, 33 L.R.A. 366 (1896); Maryland Cas. Co. v. Cherryvale Gas, Light & Power Co., 99 Kan. 563, 162 Pac. 313, 1917C L.R.A. 487 (1917); Consolidated Gas Co. v. Crocker, 82 Md. 113, 33 Atl. 423, 31 L.R.A. 785 (1895).

chain of causation and obviate liability for the original breach of duty,[9] but to do so such intervening act must be a superseding cause[10] and one which the original wrongdoer was not bound to anticipate as a natural or ordinary result of his act; this is to say that a *foreseeable* intervening cause will not supersede the defendant's responsibility.[11] Further, the standard of reasonable conduct may require the defendant to protect the plaintiff against "that occasional negligence which is one of the ordinary incidents of human life, and therefore to be anticipated."[12] In Mississippi the law in reference to the liability of natural gas distributors seems to have been reduced to a single, mechanical rule: "When a gas company has notice that gas is escaping in the premises of a patron, the company must either shut off the gas or remedy the defect, and one or the other must be done as quickly as practicably possible."[13] This standard of *conduct*, as distinguished from a standard of *care*, was first announced in *Mississippi Power & Light Co. v. McCormick*.[14] Since then the *McCormick* case seems to have been treated by the Mississippi Supreme Court as fixing a definite rule of universal application.[15]

By rigidly applying the rule of conduct of the *McCormick* case, the Mississippi Supreme Court reached a decision in the principal case contrary to the one dictated by the rules ordinarily used to determine the liability of natural gas distributors.[16] There-

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[9]Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 27 L.R.A. 583 (8th Cir. 1894); Moody v. Gulf Refining Co., 142 Tenn. 280, 218 S.W. 817, 8 A.L.R. 1243 (1920).

[10]Goodlander Mill Co. v. Standard Oil Co., *supra* note 9; Standard Oil Co. v. Wakefield, 102 Va. 824, 47 S.E. 830, 66 L.R.A. 792 (1904).

[11]Watson v. Kentucky & Ind. Bridge & R.R. Co., 137 Ky. 619, 126 S.W. 146, *modified on rehearing*, 129 S.W. 341 (1910); Lane v. Atlantic Works, 111 Mass. 136 (1876); Gilman v. Noyes, 57 N.H. 627 (1876); Standard Oil Co. v. Wakefield, *supra* note 10.

[12]McEvoy v. American Pool Corp., 32 Cal. 2d 295, 195 P.2d 783 (1948). See RESTATEMENT, TORTS § 302, comment *l* (1934).

[13]Mississippi Pub. Serv. Co. v. Cunningham, 189 Miss. 179, 195 So. 472 (1940); Mississippi Power & Light Co. v. McCormick, 175 Miss. 337, 166 So. 534 (1936).

[14]Mississippi Power & Light Co. v. McCormick, *supra* note 13.

[15]Mississippi Pub. Serv. Co. v. Cunningham, 189 Miss. 179, 195 So. 472 (1940), was based largely on the rule of the McCormick case, although the McCormick case was not in point on its facts. The factual situation of the Cunningham case seemed to call for a higher standard of conduct than that required by the rule of the McCormick case, and the dissenting justices were of opinion that the defendant was negligent in failing to disconnect the service line by removing the meter when the leak was discovered, despite the presence of a city ordinance similar to the one in the principal case.

[16]The court buttressed its holding by saying that the defendant gas company was not negligent, since it complied with the duty imposed upon it by the municipal gas code, and furthermore that the gas company was absolved from any liability by the intervening act of the unknown third person who turned on the gas at the meter. In reference to the first contention, it would seem more reasonable to interpret the municipal gas code to be merely declaratory of the *minimum* lawful standard of conduct for gas companies. *Cf.* Cutshall v. State, 191 Miss. 764, 4 So.2d 289 (1941), containing dictum to the effect that one may be negligent while acting lawfully. In answer to the second contention, it is submitted that the act of the unauthorized person who turned on the gas at the meter was readily foreseeable and hence was within the scope of the original risk, since the gas company had notice that the purpose of connecting the service line was for the immediate benefit of the workmen. It further is submitted that the defendant should not be absolved from liability because the intervening person may have been negligent. The defendant was dealing with natural gas, an "extraordinarily dangerous element," and a standard of reasonable conduct would seem to require the defendant to protect the plaintiff against "that occasional negligence which is one of the ordinary incidents of human life and therefore to be anticipated." *Cf.* McEvoy v. American Pool Corp., 32 Cal. 2d 295, 195 P.2d 783 (1948). In Loyocano v. Louisiana Power & Light Co., 165 So. 515 (La. App. 1936), the

fore, it would seem that the effect of this rule has been to change the law in Mississippi in reference to gas distributors under some factual situations.[17] While uniformity perhaps has been obtained by applying this mechanical rule, it is submitted that "there is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances."[18] Various rules of conduct have been established; many of them eventually have been abandoned. An outstanding example of this is Mr. Justice Holmes' "stop, look, and listen rule."[19] Absurd results have sometimes been reached by following ironclad rules of what constitutes due care,[20] and legal writers usually have condemned the practice of resolving mixed questions of law and fact into inflexible rules, pointing out that such attempts have nearly always been unsuccessful.[21] In the words of Mr. Justice Cardoza, "Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal."[22] The inflexible rule of conduct announced in the *McCormick* case and followed in the principal case should be abandoned in favor of a flexible standard of *care* commensurate with the extraordinarily dangerous nature of natural gas.

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defendant gas company was held liable for its negligence in failing to insert a disk in the supply pipe when cutting off the meter, even though there was an intervening third person who cut the gas back on. The court was of opinion that the act of the plumber who turned the meter back on was foreseeable; hence, the gas company was not absolved from liability.

[17]*Cf.* Farmers Gin Co. v. Leach, 178 Miss. 784, 174 So. 566 (1937), which held that one who possesses or manages dangerous articles or agencies such as electricity, explosives, and the like, must use the *highest* degree of care. Had the standard of care of this case been applied to the principal case, it seems probable that the judgment of the lower court would have been affirmed. It is submitted that the defendant gas company not only failed to use the *highest* degree of care, but that it failed also to use *requisite* care, which has been described as "that degree of care commensurate with appreciable danger appraised in terms of ordinary prudence and interpreted in the light of attendant circumstances." Roberts v. Mississippi Power & Light Co., 193 Miss. 627, 10 So.2d 542 (1942).

[18]Grand Trunk Ry. v. Ives, 144 U.S. 408, 417 (1892).

[19]In Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927), Mr. Justice Holmes announced the "stop, look, and listen rule," saying: "It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts." After a series of cases in which rigid application of the rule led to strained decisions, the rule was abandoned in Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934), in which Mr. Justice Cardoza said: "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. . . . Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal." One student writer has commented on the "stop, look, and listen rule," saying: "Certainly the tendency illustrated by the Goodman case, of resolving mixed questions of law and fact into inflexible rules, seems undesirable; for no matter how sound it may be in theory, in fact it encourages the all too common practice of urging witnesses to swear up to a headnote." Note, 43 HARV. L. REV. 926 (1930).

[20]See Benner v. Philadelphia & Reading Ry. Co., 262 Pa. 307, 105 Atl. 283, 2 A.L.R. 759 (1918).

[21]PROSSER, TORTS § 40 (2d ed. 1955); Note, 43 HARV. L. REV. 926 (1930).

[22]Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934).

WORKMEN'S COMPENSATION—DEPENDENCE—MENTALLY DEFICIENT CHILDREN OVER EIGHTEEN

In the first Mississippi case in which the question of the dependence of a mentally deficient child over eighteen years of age arose, there was a conflict in testimony concerning the amount of support given the appellant, a thirty-four year old mentally deficient daughter of the deceased. Her parents had separated when she was nine years old, and from 1933 to 1945, the year her mother died, she had been supported by her mother's second husband. Thereafter she lived with her brother, but her father contributed to her maintenance. The brother testified that her father had contributed from $250 to $300 a year, but the father's second wife, who claimed to have handled his finances, testified that his contribution never exceeded $50 a year. The circuit court affirmed the finding of the Workmen's Compensation Commission and its attorney-referee that the appellant was not "wholly dependent" within the meaning of the statute,[1] and appeal was taken to the supreme court. HELD: As the father had allowed others to assume his paternal responsibility, since he only gave his daughter sporadic aid at his pleasure, the evidence was insufficient to establish that the appellant was "wholly dependent upon the deceased employee."[2] *Aultman v. Crosby Chemicals, Inc.*, 75 So.2d 458 (Miss. 1954).

Mississippi was the last state to enact workmen's compensation legislation, but its statute has been said to embody the best from the acts of the other forty-seven states.[3] The statute defines "children" as "only persons who are under eighteen (18) years of age, and also persons who, though eighteen (18) years of age or over, are wholly dependent upon the deceased employee and incapable of self-support by reason of mental or physical disability."[4] The statute provides two presumptions of dependency: first, "children under the age of eighteen years are presumed to be dependent;"[5] and second, "[a]ll questions of dependency shall be determined as of the time of the injury," and "[a] surviving wife, child or children shall be presumed to be wholly dependent."[6] The statute does not define "dependent."[7] The Mississippi Supreme Court has held that since the legislature used both the term "dependent" and the term "wholly dependent," the court could assume that different meanings were intended. Therefore the court said that the word dependent alone would include partial dependence unless it was specified that total dependence was intended.[8] Under the attempted distinction the logical inconsistency between the two presumptions of dependency becomes apparent.[9] Dependence is generally considered a question of fact rather than law,

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[1]MISS. CODE ANN. §§ 6998-01 to -59 (1942).

[2]MISS. CODE ANN. § 6998-02 (12) (1942).

[3]Satterfield, *An Introduction to the Mississippi Workmen's Compensation Act*, 20 MISS. L.J. 27 (1948).

[4]MISS. CODE ANN. § 6998-02 (12) (1942).

[5]MISS. CODE ANN. § 6998-02 (18) (1942).

[6]MISS. CODE ANN. § 6998-13 (g) (1942).

[7]There are numerous definitions of other technical terms used therein. MISS. CODE ANN. § 6998-02 (1942). See Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 52 So.2d 639 (1951).

[8]Deemer Lumber Co. v. Hamilton, *supra* note 7, where the court noted the statute's failure to define "dependent" and judicially defined a dependent as "one who is dependent on the employee, in whole or in part, for his support, and relies on this."

[9]Reading section 6998-13 (g), "children shall be presumed to be wholly dependent," in light of the definition of "child" in section 6998-02 (12), "persons who, though eighteen (18) years of age or over, are wholly dependent upon the deceased employee and incapable of self support by reasons of mental or physical disability," the result would be that children who *must* be wholly dependent are *presumed* to be wholly dependent.

except where the statute specifically creates a presumption of dependency.[10] The best statutes are those which contain presumptions set forth categorically and in complete detail.[11] Dependence is not measured by actual pecuniary assistance, unless this is specifically required by the act;[12] furthermore, support does not have to come from wages of the deceased.[13] The dependence of children rests on a basis other than that of a spouse, dependent parent or other adult, and seems grounded wholly in the statutes.[14] There is usually a presumption of total dependence in children of "tender years."[15] Although the parent's legal duty to support his child is not the sole basis for statutory dependence, the courts give it substantial weight. Where there is no question as to presumption, the minimum test for dependence is that the child show this parental duty and a reasonable probability that he can enforce it in court.[16] Where parents are divorced, children living with their mother have been found dependent on their father;[17] even if the mother remarries this dependence continues.[18] The statutes of a majority of states contain a presumption that both infants and mentally deficient children of any age are wholly dependent.[19] Even in those states in which actual contributions by the deceased during his lifetime are prerequisite to a finding of dependence, "infants and other children who are physically or mentally incapacitated from earning a living" are excepted from this rule; they are required to prove only their relationship with the deceased, and that they have no other means of support.[20] Under this theory, a mental incompetent committed to a state asylum was found dependent on her parents since there was no binding obligation on the state to continue the care and custody of the child until her death.[21]

The Mississippi court has repeatedly stated that the act should be given a liberal and sensible interpretation to give effect to its salutary purposes, and that doubtful

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[10]See Miss. Code Ann. § 6998-13 (g) (1942); U.S.F. & G. Co. v. Washington, 139 S.E. 359 (Ga. App. 1927); Robert Gair Co. v. Industrial Comm'n, 340 Ill. 99, 172 N.E. 46 (1930).

[11]See, *e.g.*, Ala. Code *tit.* 26, § 262 (1940).

[12]Illinois Steel Co. v. Industrial Comm'n, 308 Ill. 466, 139 N.E. 921 (1933). Even in jurisdictions where proof of actual contribution is requisite to a finding of dependence, as in Connecticut, Driscoll v. Jewell Belting Co., 96 Conn. 295, 114 Atl. 109 (1921), or Massachusetts, Hassan's Case, 240 Mass. 355, 134 N.E. 260 (1925), courts have found dependency from promises of future support. Freeman's Case, 233 Mass. 287, 123 N.E. 845 (1919). "We know of no authority which holds that the furnishing of support during the life of the deceased (except where provided by statute) is absolutely essential to the establishing of actual dependency." McGarry v. Industrial Comm'n, 64 Utah 592, 232 Pac. 1090 (1931).

[13]Isaacson v. Central Coal & Coke Co., 56 S.W.2d 831 (Mo. App. 1931).

[14]McGarry v. Industrial Comm'n, 64 Utah 81, 232 Pac. 1090 (1931).

[15]Utah-Apex Mining Co. v. Industrial Comm'n, 66 Utah 529, 244 Pac. 656 (1932).

[16]Utah-Apex Mining Co. v. Industrial Comm'n, *supra* note 15.

[17]Peters v. Industrial Comm'n, 314 Ill. 560, 145 N.E. 629 (1924); Vigo American Clay Co. v. Kelly, 147 N.E. 301 (Ind. App. 1925).

[18]Cullen v. Pan Handle Coal Co., 141 N.E. 647 (Ind. App. 1923); Log Mountain Coal Co. v. Head, 219 Ky. 799, 294 S.W. 470 (1927).

[19]Alabama, Gulf States Steel Co. v. Griffin, 214 Ala. 126, 106 So. 898 (1926); California, Federal Mut. Liab. Ins. Co. v. Industrial Comm'n, 187 Cal. 469, 202 Pac. 664 (1921); Georgia, U.S.F. & G. Co. v. Washington, 139 S.E. 359 (Ga. App. 1927); Indiana, Srajn v. Tighe Coal Co., 83 Ind. App. 537, 149 N.E. 187 (1925); Massachusetts, Bott's Case, 230 Mass. 152, 119 N.E. 755 (1919); Virginia, Indemnity Ins. Co. v. Nalls, 160 Va. 246, 168 S.E. 346 (1933).

[20]McGarry v. Industrial Comm'n, 64 Utah 592, 232 Pac. 1090 (1931).

[21]Indemnity Ins. Co. v. Nalls, 160 Va. 246, 168 S.E. 346 (1933). In Mississippi a child was found dependent on her mother even though the child had been committed to a mental institution. Holsomback v. Slaughter, 177 Miss. 553, 171 So. 542 (1937).

cases should be decided in favor of compensation.[22] The instant case, however, lays down an almost impossible burden for the mentally deficient child over eighteen, who must not only prove his mental incapacity, but also his complete dependence on the deceased parent. This is directly contrary to the presumption given him by the statute and against the historic concept that such persons are presumed wholly dependent.[23] The decision shows that there is need for a statutory change. Had the court followed its policy of statutory interpretation by taking part of the statute in relation to the whole[24] the unreconcilable inconsistency between the two presumptions would have been apparent.[25] However, the court only gave effect to the presumption of dependence in children under eighteen,[26] requiring mentally deficient children over eighteen to prove both the incapacity and total dependence. The confusion in the statute apparently disrupted the court's ability to reason. Furthermore, the court failed to remedy the statutory inconsistency, either under the rule of liberal and sensible interpretation,[27] under the theory of an enforceable paternal obligation with real potential value to the child,[28] or under the common law theory of the child's legal dependence and lack of other means of support.[29] The court has left a burden of proof for mentally deficient children who are over eighteen which is most strenuous and completely out of line with the theory of all other workmen's compensation acts. It is suggested that an amendment is necessary, which when made should follow those statutes which define "dependent" and "dependence" in minute detail, delineating the classes of persons covered by each presumption categorically.[30]

Douglas C. Wynn

WORKMEN'S COMPENSATION—INJURY INCURRED IN COMPANY SPONSORED BASEBALL GAME HELD COMPENSABLE

Claimant-employee sustained serious injuries while participating in a company league softball game. The intra-company league consisted of fifteen teams organized from among the employees of the defendant's 153 stores in the Chicago area. Playing was optional and in no way affected the employee's wage; the participants were not allowed time off for games, all of which were held at public parks after working hours. Company district managers appointed manager-captains and provided bats and balls; after a request by the employees, T-shirts which bore the company and team names were provided at company expense. All other equipment was furnished by the players. Information concerning the games was disseminated through company publications and over the company operated radio station. Negligible advertising benefits were received by the company, for the public was not invited to attend and accomodations were not provided for friends and relatives who did attend. The Industrial

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[22]National Surety Corp. v. Kemp, 217 Miss. 537, 64 So.2d 723 (1953); Miles & Sons v. Myatt, 215 Miss. 589, 61 So.2d 390 (1952); Mutual Implement Co. v. Pittman, 214 Miss. 823, 59 So.2d 547 (1952); Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 52 So.2d 634 (1951); Lucedale Veneer Co. v. Rogers, 211 Miss. 613, 48 So.2d 148 (1950).

[23]MISS. CODE ANN. § 6998-13 (g) (1942). Cases cited note 22 *supra*.

[24]See Mills v. Barrett, 213 Miss. 171, 56 So.2d 485 (1952), and cases cited therein.

[25]See note 9 *supra*.

[26]MISS. CODE ANN. § 6998-02 (18) (1942).

[27]Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 52 So.2d 634 (1951).

[28]Utah-Apex Mining Co. v. Industrial Comm'n, 66 Utah 529, 244 Pac. 656 (1932).

[29]Holsomback v. Slaughter, 177 Miss. 555, 171 So. 542 (1937).

[30]See, *e.g.*, ALA. CODE tit. 26, § 262 (1940).

Commission awarded the claimant compensation after finding the injuries received arose "out of and in the course of" his employment under the terms of the Illinois Workmen's Compensation Act.[1] Claimant appealed from the superior court's reversal of the Commission. HELD: The claimant's injuries were compensable, as participation on the team could be regarded as an incident of employment. *Jewel Tea Co. v. Industrial Comm'n,* 128 N.E.2d 699 (Ill. 1955).

Workmen's compensation statutes of the various states provide that a compensable injury must arise "out of and in the course of employment," or some synonymous phrase, a limitation of this nature being essential to effectuate the purposes of workmen's compensation.[2] Seven cases have been presented to the courts concerning injuries received by employees playing on company baseball teams in public parks after working hours. Although the factual situations vary somewhat as to the amount of company control, supervision and financial aid, and benefits received by the employer and the employees, these cases were decided upon the same basic question. Two of the cases[3] held the injuries arose "out of and in the course of employment," whereas the remaining five cases[4] refused to grant the compensation sought. Compensation has been allowed for injuries received in company organized recreational activities under the "mutual benefits" doctrine[5] when the court believed the employer expected or actually received benefits from the employees' participation, but the "mutual benefits" doctrine has been rejected in numerous cases.[6] Other cases awarding compensation rest heavily upon the fact that the injury was sustained on company property.[7] In *Brown v. United Services For Air, Inc.*[8] compensation was allowed for an injury incurred in a lunch hour volley ball game; the court found the encouragement and consent of the employer to be to such an extent as to render participation an incident of employment. Also, compensation may be allowed where the activity is normal, accepted, and shown to have achieved some standing as a custom or practice either in the industry generally or in the particular place involved.[9] The presence of substan-

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[1]ILL. ANN. STAT. ch. 48, §§ 138—172c (1936).

[2]"Compensation shall be payable for disability or death of an employee from injury arising out of and in the course of employment, without regard to fault as to the cause of injury. . . ." MISS. CODE ANN. § 6998-04 (1942).

[3]LeBar v. Ewald Bros. Dairy, 217 Minn. 16, 13 N.W.2d 729 (1944); Ott v. Industrial Comm'n, 83 Ohio App. 13, 82 N.E.2d 137 (1948); *accord,* Fishman v. Lafayette Radio Corp., 275 App. Div. 876, 89 N.Y.S.2d 563 (1949), where the employee was allowed to leave work early.

[4]McFarland v. St. Louis Car. Co., 262 S.W.2d 344 (Mo. 1953); Padula v. Royal Plating and Polishing Co., 82 A.2d 225 (N.J. 1951); Leventhal v. Wright Aeronautical Corp., 25 N.J. Misc. 154, 51 A.2d 237 (1946); Porowski v. American Can Co., 15 N.J. Misc. 316, 191 Atl. 296 (1937); Wilson v. General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781 (1949).

[5]DuCharme v. Columbia Engineering Co., 31 N.J. Super. 167, 106 A.2d 23 (1954); Kelley v. Hackensack Water Co., 10 N.J. Super. 528, 77 A.2d 467 (1950).

[6]Lutheran v. Ford Motor Co., 313 Mich. 487, 21 N.W.2d 825 (1946); Padula v. Royal Plating and Polishing Co., 82 A.2d 225 (N.J. 1951); Stevens v. Essex Fells Country Club, 26 N.J.L. 656, 57 A.2d 469 (1948).

[7]Conklin v. Kansas City Pub. Serv. Comm'n, 226 Mo. App. 309, 41 S.W.2d 608 (1931); DuCharme v. Columbia Engineering Co., 31 N.J. Super. 167, 106 A.2d 23 (1954); Tedesco v. General Elec. Co., 305 N.Y. 544, 114 N.E.2d 33 (1953); Brown v. United Services For Air, Inc., 298 N.Y. 901, 84 N.E.2d 810 (1949); Piusinski v. Transit Valley Country Club, 259 App. Div. 765, 18 N.Y.S.2d 316, *aff'd,* 283 N.Y. 674, 28 N.E.2d 401 (1940).

[8]298 N.Y. 901, 84 N.E.2d 810 (1949).

[9]Woodmansee v. Frank Lyon Co., 265 S.W.2d 521 (Ark. 1954); Winter v. Industrial Accident Comm'n, 129 Cal. App. 100, 276 P.2d 689 (1954).

tial pressure or actual compulsion upon the employee to attend will extend the coverage of the act,[10] just as if attendance is required to fulfill obligations to the employer.[11]

Conversely, the test relates to the time, conduct, and place; an injury not fairly traceable to the employment as the contributing cause does not arise out of the employment.[12] The right of the employer to control the employee is the *true basis*[13] in a case of this nature. In the instant case the injury was sustained on the employee's time, off the employer's premises, while engaged in a sport not related to, or controlled by, his employment. It would seem that the employee's claim should fail. The employer should not be burdened with liability merely because the employer receives some benefit from an athletic program,[14] such as good will and healthy employees; or, it may be urged that the benefits which inured to the employer were too remote[15] to have any substantial bearing upon the case. Generosity alone to one's employees does not render one liable for compensation under the act for injuries suffered while in the enjoyment of the favor, even though there is reciprocal good will and heightening of morale.[16] An employer should not be penalized for a gratuitous contribution to his employees' social life.[17] Compensation in this type of situation would cause employers to withhold support[18] from many worthwhile activities. As a matter of policy, the courts should not condemn the employers' encouragement and support by attaching liability. If there is no compulsion or undue influence upon the employee and he suffers no penalty if he does not participate, the benefits of the statute should not be extended,[19] for the activity is for his own pleasure.[20] In view of the over-all theory of workmen's compensation, the more conservative position, disallowing the employee's claim, would be more appropriate, for any coverage extended would appear to be judicial legislation, and, in effect, to defeat the purposes of the act.

Edward L. Atkinson

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[10]Moore's Case, 330 Mass. 1, 110 N.E.2d 764 (1953); Harrison v. Stanton, 26 N.J. Super. 194, 97 A.2d 687, *aff'd*, 14 N.J. 172, 101 A.2d 554 (1953); Kelley v. Hackensack Water Co., 10 N.J. Super. 528, 77 A.2d 467 (1950). See also Miller v. Keystone Appliances, Inc., 133 Pa. Super. 354, 2 A.2d 508 (1938), where an employer's request that all employees be present was held to be sufficient influence.

[11]Woodmansee v. Frank Lyon Co., 265 S.W.2d 521 (Ark. 1954); Stout v. Sterling Aluminum Products Co., 213 S.W.2d 244 (Mo. 1948); Wilson v. General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781 (1949).

[12]F. Becker Asphaltum Roofing Co. v. Industrial Comm'n, 333 Ill. 340, 164 N.E. 668 (1929); Stout v. Sterling Aluminum Products Co., *supra* note 11.

[13]McFarland v. St. Louis Car Co., 262 S.W.2d 344 (Mo. 1953); Stout v. Sterling Aluminum Products Co., 213 S.W.2d 244 (Mo. 1948); Wilson v. General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781 (1949); Pate v. Plymouth Mfg. Co., 198 S.C. 159, 17 S.E.2d 146 (1941).

[14]Woodmansee v. Frank Lyon Co., 265 S.W.2d 521 (Ark. 1954); Clark v. Chrysler Corp., 276 Mich. 24, 267 N.W. 589 (1936); McFarland v. St. Louis Car Co., *supra* note 13; Stout v. Sterling Aluminum Products Co., *supra* note 13; Congdon v. Klett, 307 N.Y. 218, 120 N.E.2d 796 (1954).

[15]Padula v. Royal Plating and Polishing Co., 82 A.2d 225 (N.J. 1951); Stevens v. Essex Fells Country Club, 26 N.J.L. 656, 57 A.2d 469 (1948); Wilson v. General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781 (1949).

[16]Padula v. Royal Plating and Polishing Co., *supra* note 15; Stevens v. Essex Fells Country Club, *supra* note 15.

[17]McFarland v. St. Louis Car Co., 262 S.W.2d 344 (Mo. 1953); Wilson v. General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781 (1949).

[18]Clark v. Chrysler Corp., 276 Mich. 24, 267 N.W. 589 (1936); McFarland v. St. Louis Car Co., *supra* note 17; Congdon v. Klett, 307 N.Y. 218, 120 N.E.2d 796 (1954).

[19]Stout v. Sterling Aluminum Products Co., 213 S.W.2d 244 (Mo. 1948); Congdon v. Klett, *supra* note 18.

[20]McManus' Case, 289 Mass. 65, 193 N.E. 732 (1935).

RECENT BOOKS

THE FORGOTTEN NINTH AMENDMENT: By Bennett B. Patterson. Indianapolis: Bobbs-Merrill Company, Inc., 1955. Pp. 223. $4.00.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

The Constitution was adopted very grudgingly by eleven of the colonies, and not at all by two of them, the reason being that the Constitution did not carry a guarantee of certain human freedoms. Gerry, Randolph, and Mason refused to sign for this reason, and Virginia, which was then the largest and most important state, did not ratify the Constitution until the proponents thereof agreed that amendments would be considered at the first session of Congress.

There were those, however, who believed that a Bill of Rights was not only unnecessary, but would be harmful. Alexander Hamilton, for example, stated that the newly formed government had no power to regulate the press, and feared that a clause in the Constitution expressly prohibiting governmental restraint would furnish "to men disposed to usurp, a plausible pretense for claiming that power." Furthermore, the colonists had argued, petitioned, and finally waged war to secure the rights of Englishmen, rights so manifold that their enumeration would not fit into the narrow confines of a written constitution. It was feared that the enumeration of some of these rights might lend plausibility to the argument that those not specifically mentioned were no longer deemed essential. What is now the ninth amendment was adopted to allay these fears.

As originally proposed by Madison, the ninth amendment read as follows:

> "The exceptions here or elsewhere in the Constitution, made in favor of some particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."

The amendment was approved by the House of Representatives and submitted to the Committee on Style. This committee had authority to change phraseology, but not substance. Consequently, in construing the ninth amendment, reference may be had to the original proposal.

The original language of the ninth amendment clarifies its intent and purpose. The preamble to the Declaration of Independence declares that all men are endowed by their Creator with certain "unalienable rights." The debates preceding the adoption of the Constitution pinpointed the universal acceptance of this view. Those who drafted the Constitution did not intend to lodge power in the new Government to regulate or restrict these "unalienable rights." To supplement and augment this intent, restrictive clauses concerning certain of these rights were added to the Constitution in the form of amendments. The ninth amendment was adopted to protect the other "unalienable rights."

The author states that the ninth amendment was designed to apply as a restraint upon state governments as well as upon the federal government. The body of the Constitution prohibits the federal government and the state governments from taking certain kinds of actions. Section nine of article one restricts the powers of Con-

gress: "No Bill of Attainder or ex post facto Law shall be passed; [n]o capitation, or other direct, Tax shall be laid . . . ; [n]o Title of Nobility shall be granted. . . ." Section ten of the same article similarly restricts the power of the states: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts. . . ."

The twelve proposed amendments to the Constitution originally were intended to be interspersed throughout the Constitution at appropriate places. Madison, who was primarily responsible for the various proposed amendments, suggested that what is now the ninth amendment be inserted in the Constitution under article one, section nine, between the provisions relating to a "Bill of Attainder" and the clause with respect to a "capitation or other direct tax." It should be borne in mind that the then proposed ninth amendment began with the following: "The exceptions *here or elsewhere* in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people. . . ." [Emphasis added]. The wording "here or elsewhere," coupled with the fact that the amendment was to be inserted in article one, section nine, certainly referred to article one, section ten, which restricted the power of the states in designated ways. The conclusion is that the Constitution guarantees the inhabitants of the United States freedom from *state* enacted bills of attainder, *state* enacted ex post facto laws, *state* enacted laws impairing the obligations of contracts, and, under the author's view of the ninth amendment, *state* enacted laws impairing the "unalienable rights" not otherwise protected.

What are the unenumerated "unalienable rights" retained by the people and protected by the ninth amendment from federal and state intrusion? At a minimum these rights include those "rights of Englishmen" discussed in Blackstone's *Commentaries*, the denial of which caused the colonists to wage a revolution. The author suggests that the philosophy of the ninth amendment is a living and growing one, and that the ninth amendment was not intended to protect only those rights basic at the time of Blackstone. Rights now basic are also within its protective orbit: the right of privacy (from congressional committees?), the right to strike, and the right to participate in government, to mention a few.

If, as the author's research suggests, the ninth amendment was designed to protect basic though non-specified rights from restrictive action by governmental bodies, both state and federal, why have the courts and commentators allowed this legal weapon to rust with disuse? Two reasons are advanced: (1) Early unfortunate dicta limited the ninth amendment to use as a barrier against federal action only; and more importantly, (2) the courts have been protecting some of the fundamental and inherent rights through the due process clauses of the fifth and fourteenth amendments.

Does the protection afforded the basic rights by the due process clauses justify the relegation of the ninth amendment to limbo? Not at all, as the Supreme Court has held that not even all the rights enumerated in the first eight amendments are carried over to the states by the fourteenth amendment, and the first eight amendments do not exhaust the area of basic rights. To protect these unenumerated but basic rights from curtailment by state and federal governmental officials, one must look to the ninth amendment. The potential force of this amendment lies untapped, and virtually uncontrolled by prior judicial construction. The author correctly states, "If our research has brought to light a truth, then it is a truth of great importance."

Has he brought to light a truth? The answer to this question can be found in the answer to questions such as the following.

Blackstone classifies the right of privacy in one's own home as a fundamental right of Englishmen. In *Irvine v. California,* 347 U.S. 128 (1953), the Supreme Court held that California officials did not violate the due process clause of the fourteenth amendment when they obtained evidence by breaking into a house when the owner was absent, and concealing a microphone in the bedroom. Will the Supreme Court hold that such conduct by state law-enforcement officials violates the ninth amendment?

The Supreme Court held long ago that the right of people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution, and hence, when the purpose of the assembly is other than to "petition the government for a redress of grievances" this right of assembly is not "granted or secured" by the Constitution as the quoted term is used in the Civil Rights Statute. *United States v. Cruikshank,* 92 U.S. 542 (1875). Would the answer be different today if viewed in the light of the ninth amendment?

If the answer to questions such as these is in the affirmative, then the author has indeed brought to light a truth of immense importance. But no matter what the answer, the author is to be congratulated for bringing to light, as briefly outlined above, the forgotten ninth amendment.

The author does more, however. He sets forth a personal credo concerning the importance of being an individual; and additionally, he appends to his treatise the debates and proceedings in the First Congress relative to the first proposed twelve amendments. Reasonable men may differ as to the merits of the author's "credo," but there can be no dissent concerning the appendix. The debates and proceedings are long out of print and available only at the largest libraries. The author is to be congratulated once again for furnishing to students of the Bill of Rights access to one of the most important source books ever written upon the subject.

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YOUTH AND THE LAW. By Frederick J. Ludwig.
Brooklyn: Foundation Press, Inc., 1955. Pp. 386. $5.50.

The Lieutenant-Governor of New York, George B. DeLuca, who is a member of the Commission on Youth and Delinquency, wrote the foreword to this book. In his opening paragraph he said: "This book is different. Nothing like it has been written before. It is more than a manual. It is a treatise—analytical, informative, historical, legal and even philosophical. It embraces the law as it affects youth from a national perspective with some emphasis on the State of New York as being perhaps somewhat typical of the remaining states."

The book is divided into five parts, the first being "Responsibility of Young Offenders." Chapter I of Part I covers the responsibility of young offenders in New York. It is very interesting as a comparison to our own Mississippi law. A case study of this material with our own youth court acts suggests certain possible changes which are needed in our own law.

Chapter II of Part I considers the "History and Rationale of Criminal Responsibility of Young Offenders." This chapter offers a good synopsis of the historical background of the Roman law, the Mosaic Code and the Moslem system, and shows how the Anglo-American rule on minority was shaped from the Roman law. On page fourteen the author says: "A child's mental capacity, according to Justinian, did not differ much from that of an insane person. Through the Canon law, this rule was ultimately to become part of the common law and remains unchanged today in the overwhelming number of American jurisdictions." Historical development under English jurisprudence is then traced. This backward glance shows most strikingly the universally acknowledged propriety of mitigation in treating immature offenders found responsible, yet the frequent failure to put the principle into practice.

The rules concerning criminal responsibility of young offenders in various states are compared. It is evident that there has been a gradual upward revision of the Roman and common law rule of absolute irresponsibility below the age of seven years. The youth court acts have changed this situation greatly. The most recent trend is to extend the upper age limit to give older offenders procedural or treatment advantages under the juvenile court acts; this can best be accomplished by non-criminal procedure and non-punitive treatment.

Chapter II also deals with the rational responsibility of immature offenders. On page twenty-three the author states: "The problem can be solved only by deciding what the end of a body of laws on juvenile crime ought to be." There then follows a good discussion as to whether the immature offenders should be ignored, rehabilitated or deterred.

Part II covers the subject of courts and judicial procedure. Chapter III deals with the constitutional questions encountered in the treatment of immature offenders, and there follows an excellent discussion of the constitutional questions of equal treatment, parental rights to notice and the right of trial by jury.

Chapter IV, Part II, deals with the jurisdiction of criminal courts generally. Such items as the place of commission, the nature of the offense and the age of the offenders are discussed in detail.

Chapter V discusses the functions of the Children's Court in New York. Its functions are very similar to those of Mississippi's Youth Court, except that the Children's Court's jurisdiction is limited to children under sixteen years of age. It

is also a part of the Domestic Relations Court in the City of New York. The most interesting thing about this court is that it has its own psychiatric clinic which offers diagnostic and treatment services. This is something we need greatly in Mississippi.

Chapter VI of Part II deals with the City Magistrate's Court in the City of New York as well as the district and special courts. The most interesting item in the study of these courts is that although the City Magistrate's Court has no power to handle young offenders differently from adults, a youth term is set up to handle them separately. The court has a boys' term and a girls' term to deal with these groups which, incidentally, differ in age—for boys, sixteen to nineteen; for girls, sixteen to twenty-one. This classification of age has not, however, been viewed very favorably.

Chapter VII deals with courts of special sessions, general sessions, county and supreme courts. A study of Chapter VII would be interesting only to persons concerned with New York law.

Chapter VIII of Part II deals with youthful offender proceedings. I could do no better than to quote from page seventy-nine in summation of this chapter: "It adopts rehabilitation, the purpose of treatment of the former system, by removing the stigma of criminal conviction and providing treatment based upon individual need with greater latitude for probation and more judicial discretion in commitment and recommitment of young offenders." This is a chapter that should be read by all persons dealing with the youth of Mississippi.

Chapter IX deals with the possibility of a unified court for older juvenile offenders. On page eighty-nine the author observes that, "because the bulk of serious crimes . . . are committed by adolescent law breakers between sixteen and twenty-one, a compelling consideration is the unification of criminal justice for them in a single adolescent court." There follows a very detailed discussion of how this court could be set up.

Chapter X of Part II deals with federal procedure and treatment. Although this chapter is well done, I do not think that a synopsis would serve any good purpose. I do recommend it, however, to all in any way interested in federal procedure and treatment.

Part III deals with treatment of juvenile offenders, covering such matters as probation, sentence and commitment of minors. This is probably one of the most important chapters insofar as a study of needed changes in Mississippi law is concerned. Part III should, therefore, be read and studied in detail by all persons interested in improving our own treatment of juvenile offenders.

Part IV deals with the protection of young persons. I was both amazed and impressed by the sentence which began this chapter: "There are no delinquent children; there are only delinquent parents." I have said many times that there would not be so many delinquent children if there were not so many delinquent adults, and this, I think, is a fairer statement. Part IV covers such important items as parental responsibility, protection from sex criminals, protection of children at work, prevention of narcotic addiction among young persons, protection of infants in civil proceedings and last, but not least, adoptions and guardianships. All of these titles are self-explanatory and should be referred to for information on the various subjects. I would certainly recommend the chapter on protection from sex criminals to all county and district attorneys and all circuit and chancery judges.

Part V, which is the Epilogue, in my opinion should be read first instead of last. This is truly a Preface to Reform.

In recommending this book, I could find no better way to end than in quoting from the author: "Much, of course, in this *prolegomena* to reform is made to depend upon the wisdom, devotion, zeal and kindliness of the administrators of the law rather than upon the blackletter text of the statutes."

William Neville
Chancellor
Meridian, Mississippi

BOOKS RECEIVED

AMERICAN CONSTITUTIONAL LAW. By Bernard Schwartz. New York: Cambridge University Press, 1955. Pp. 364. $5.00.

BROWNSON READER. By Alvan S. Ryan. New York: P. J. Kenedy & Sons, 1955. Pp. 370. $4.50.

GUARANTEED FOR LIFE: YOUR RIGHTS UNDER THE UNITED STATES CONSTITUTION. By Bruce Allyn Findlay. New York: Prentice-Hall, Inc., 1955. Pp. 137. $2.50.

LAW OF DISPUTED AND FORGED DOCUMENTS. By J. Newton Baker. Charlottesville, Virginia: The Michie Company, 1955. Pp. 560. $15.00.

STUDYING LAW. By Arthur T. Vanderbilt. New York: New York University Press, 1955. Pp. 753. $6.00.

UNDERSTANDING THE ANTITRUST LAWS. By Jerrold G. Van Cise. New York: Practising Law Institute, 1955. Pp. 173. $2.50.

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